Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GARY VICKERY,

Petitioner,

v.

JANELL JONES, WILLIAM PEARMAN, KIRK BROWN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a political party's participation in a patronage system, whereby the State Respondents delegate to the Party Respondents the selection of persons for public employment positions, protected by the First Amendment to the United States Constitution?

2. Did the Complaint state a cause of action against the Party Respondents?

3. Given the facts in this case, were the State Respondents entitled to qualified immunity when temporary employment positions were filled on a political basis?

4. By the spring of 1992, was the law clearly established that non-civil service public employment positions could not be filled based on political affiliation or political sponsorship unless the position fell under the exemptions defined by the United States Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980) and *Rutan v. Republican Party*, 497 U.S. 62, 110 S.Ct. 2629 (1990)?

5. By the spring of 1992, was the law clearly established that the nature of the position, not the duration of the public employment position, governed whether or not the public employment position could be filled politically?

PARTIES TO THE PROCEEDING

The parties to the proceedings before this Court are:

Petitioner:

GARY VICKERY had worked for the Illinois Department of Transportation (IDOT) as a six month temporary highway maintainer and did not receive a subsequent employment position with IDOT.

Petitioner appears before this Court individually and as representative of the following classes:

Class A: all persons denied the position of full-time temporary highway maintainer for periods of six months due to their political affiliation or non-affiliation or lack of support by the Republican Party.

Class B: all persons denied the position of highway maintainer as established under the Illinois Personnel Code, Ill.Rev.Stat. Ch. 127, due to their political affiliation or non-affiliation or the lack of support by the Republican Party.

Respondents:

JANELL JONES was employed in the Governor's Office of the State of Illinois and dealt with personnel matters.[1]

WILLIAM PEARMAN was employed as head of personnel at the Illinois Department of Transportation (IDOT).[1]

KIRK BROWN was the Director of the Illinois Department of Transportation.[1]

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[1] Jones, Pearman and Brown are referred to herein as the State Respondents.

WILLIAM ROBERTS was the Chairman of the Saline County Republican Central Committee.[2]

SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE is that unit of the Republican Party operating in Saline County, Illinois.[2]

There are no other parties to this action.

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[2] Roberts and the Saline County Republican Central Committee are referred to herein as the Party Respondents.

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The Petitioner, Gary Vickery, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on November 22, 1996.

OPINIONS BELOW

On November 22, 1996, the United States Court of Appeals for the Seventh Circuit issued its opinion in this case affirming the decision of the United States District Court. The Court of Appeals decision is found at 100 F.3d 1334 (7th Cir. 1996), and reprinted in the Appendix at A-1. The District Court opinion which formed the basis of the Appeal is found at 856 F.Supp. 1313 (S.D. Ill. 1994), and was entered on July 6, 1994. It is reprinted in the Appendix at C-1.

STATEMENT OF JURISDICTION

On November 22, 1996, the Court of Appeals entered the judgment for which Petitioners seek the Writ of Certiorari.

This Court has jurisdiction to review this case under 28 *U.S.C.* §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution[3]:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

42 *U.S.C.* §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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[3] The First Amendment to the United States Constitution is applied to the states through the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Facts

A. *Background.*

On June 21, 1990 this Court decided the case of *Rutan v. Republican Party*, 497 U.S. 62 (1990). This Court held that public employers could not base promotion, recall from layoff, transfer or hiring on political affiliation or political support. An exception was made for those policy-making or confidential positions for which political affiliation is an appropriate requirement.

On June 22, 1990, immediately following the decision in *Rutan*, Illinois Governor Thompson issued Executive Order No. 3 (1990), which read:

> PERSONNEL DIRECTIVE
>
> Effective on the close of business today, June 22, 1990, all agencies, departments, bureaus, boards and commissions subject to the control or direction of the Governor shall conform their personnel practices to the principles of the *Rutan v. Republican Party of Illinois* decision, to the extent that such practices may differ from those permitted by that decision. Under this ruling, no one may be denied State employment, promotion, transfer or recall to a position based on political party affiliation or support.

That Executive Order was followed by Administrative Order Number 1 (1990) on July 17, 1990. In that Order Governor Thompson said *Rutan applied to "non-policy-making employees"* (paragraph 1). The Order further said:

> 1. *All hiring* and other personnel decisions *should be based on the merit and qualifications of the candidates* . . . . (paragraph 3)
>
> 2. *No hiring* or other personnel decisions—including promotions, transfers or recalls from layoff—*may be*

> *decided on the basis of the candidate's party affiliation or support. . . .* (paragraph 4)
>
> 3. No investigation shall be performed into a candidate's political affiliation, including his or her voting record, financial support, and/or willingness to work for or donate to any political party. This information shall not be reviewed or considered at any point in the employment process. (emphasis added)

After Jim Edgar became Governor of Illinois in January of 1991 he issued Administrative Order No. 1 (1991). Governor Edgar reaffirmed and adopted Governor Thompson's Administrative Order No. 1 (1990) and said:

> On June 21, 1990, the United States Supreme Court ruled for the first time, in the case of *Rutan v. the Republican Party of Illinois*, that decisions to hire, promote, transfer or recall from layoff employees of public bodies could not be made on the basis of such employees' political affiliation or support. *The exception for policy making or confidential employees or spokespersons established in earlier cases also applies to the Rutan ruling.*
>
> *I hereby commit myself and all appointees, officials and employees in my Administration to fully comply with this ruling* and all other, relevant constitutional provisions, laws and United States Supreme Court decisions . . . .
>
> Furthermore I hereby affirm and adopt the provisions of Administrative Order No. 1 (1990), which state in pertinent part the following: . . .
>
> 3. *All hiring* and other personnel decisions *affecting non-exempt individuals shall be based on the merit and qualifications of the candidates.* (emphasis added)

The footnote on the first page of that Order read:

> * As used in this Order, "non-exempt" refers to an employee who is not exempt from the requirements of

> *Rutan* and *has no relevance to whether such employee is or is not exempt from the Illinois Personnel Code*. (emphasis added)

Temporary positions are exempt from the protection of the Illinois Personnel Code as to discharge for cause. 20 *ILCS* 415 *et seq*. In other words, temporary employees are "at will" with a usual duration of six months.

In the Spring of 1992 the parties in *Rutan* reached a settlement which was approved by the United States District Court for the Central District of Illinois on May 7, 1992. The Final Judgment Order in *Rutan* was entered on June 12, 1992.

The "Whereas" clauses of the settlement agreement make repeated reference to the Orders issued by Governors Thompson and Edgar, recited above, and to the fact employment practices had been brought into compliance with *Rutan*.

Paragraph 3 of the Settlement Agreement reads:

> 3. The four classes consist of the following employees and applicants for employment in non-exempt positions in the period February 1, 1981, to June 20, 1990 (for purposes of this settlement), *"non-exempt positions" shall exclude those contained on the list to be published by CMS by March 15, 1992*. (emphasis added)

Class A

All employees who sought a promotion into a non-exempt position in a department, board or commission under the jurisdiction of the Governor;

Class B

All employees who sought a geographical transfer to a non-exempt position within a department, board or commission under the jurisdiction of the Governor;

Class C

All former employees of a department, board or commission under the jurisdiction of the Governor who were laid off and sought to be recalled to a non-exempt position with a department, board or commission under the jurisdiction of the Governor; and

Class D

All persons who sought but did not obtain a non-exempt position in a department, board or commission under the jurisdiction of the Governor.

CMS did issue the written exempt list by March 15, 1992, and has updated that exempt list periodically since 1992. The list was compiled with the assistance of the consulting firm of Ernst and Young. *The position of temporary highway maintainer does not appear on that exempt list. The permanent highway maintainer position does not appear on that exempt list.*

Paragraph 10 of the *Rutan* Settlement Agreement read:

10. Within 10 days of the District Court's approval of this Agreement, *the current State Officials will cause a notice in the form attached as Exhibit A hereto to be posted in an appropriate public location* in the personnel office of each department, board or commission under the jurisdiction of the Governor and wherever notice of rights under the Worker's Compensation Act is posted in each department, board or commission under the jurisdiction of the Governor.

Exhibit A read:

Notice

On June 21, 1990, in the case entitled *Rutan v. Republican Party of Illinois*, the United States Supreme Court ruled that promotion, transfer, recall from layoff and hiring decisions involving certain public employees may not be based on political affiliation or political party support.

The *Rutan* decision does not apply to positions for which political affiliation or support is an appropriate job consideration. Those exempt positions in this department [board or commission] are:

_____

Governor Edgar is committed to full compliance with the Supreme Court's decision in *Rutan* for non-exempt positions and already has promulgated a series of orders for that purpose and for the purpose of ensuring that employment decisions are based on the merit and qualifications of the job candidates. Those orders are available for public inspection at _____.

If you believe that a personnel decision has been made in violation of the *Rutan* decision, you may contact the designated personnel representative within your department [board or commission] or an attorney of your choice.

The position of temporary highway maintainer did not appear on the exempt list posted at IDOT. Neither did the permanent highway maintainer position. Thus, neither public list required by the *Rutan* settlement agreement listed the temporary position of highway maintainer as one that was exempt from *Rutan*.[4] The State Respondents *admitted* that the permanent highway maintainer position was protected by *Rutan* and that the duties of the temporary highway maintainer were the same as the permanent highway maintainer.

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[4] Plaintiff notes the *Rutan* Settlement Agreement states that paragraphs four-six do not provide members of the classes with any basis for any claim, but there is no similar provision as to paragraph ten.

B. *Allegations Of The Complaint Regarding The Party Respondents.*

The Petitioner alleged the following in his Complaint against the Party Respondents:

> 8. Defendant, WILLIAM ROBERTS, is an adult, male resident of Saline County, State of Illinois; at all times relevant hereto he was the Chairman of the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE; he is being sued in his individual capacity and as head of the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE. (App. D-3)
>
> 9. Defendant SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE, is a political, not-for-profit association located in Saline County, State of Illinois. (App. D-4)
>
> c. The Defendant SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and other Republican Party County Organizations under the direction of Defendant ROBERTS and other party officials screened employees by determining:
>
> 1) the voting history of the person and the voting history of that person's relatives;
>
> 2) the person's and his family's past financial support of the Republican Party and its candidates;
>
> 3) the future potential of such financial support;
>
> 4) the potential of future "volunteer" work by the applicant on behalf of the Republican Party and its candidates:
>
> 5) the sponsorship of the person by influential Republicans.
>
> d. Defendant PEERMAN and BROWN had legal authority in approving or disapproving pro-

> posed employment contracts. They cooperated with the patronage system by active participation in or *by delegating to Defendants JONES, ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and other officials of the Republican Party in counties throughout the State the decisions regarding six-month contracts for the position of highway maintainer.*[5] (App. D-6 - D-7) (emphasis added)

On July 6, 1994, the District Court granted the motion to dismiss the Party Respondents on the grounds the Complaint did not state a cause of action against them.

C. *Facts In This Case.*

Petitioner, Gary Vickery, had worked as a temporary highway maintainer from September 30, 1991, to March 31, 1992, at the Illinois Department of Transportation's (IDOT) shed at Harrisburg, Illinois. There is no dispute that Petitioner performed his duties in an acceptable manner.

The State Respondents admitted that Petitioner's duties in the temporary position were the same as the full-time, civil service highway maintainer position established under the Illinois Personnel Code. The State Respondents further admitted that the permanent highway maintainer position is not exempt from *Rutan*. This determination was made after an audit of the job duties was performed by the Illinois Department of Central Management Services.

The State Respondents admitted that in mid-1991 the administration began to treat all temporary positions, regardless of the duties of the position, as exempt from *Rutan*.

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[5] As discovery unfolded it became clear the positions in question were temporary *employment* positions usually with a duration of six months.

The State Respondents admitted in their answer that they did consider affiliation with or support by representatives of the Republican Party in filling the temporary positions and that "they generally favored persons who were supported by the Republican party" in filling temporary positions. In each of the two years preceding the filing of the Complaint, IDOT had filled approximately 450 full-time six month temporary highway maintainer positions; this is in addition to the "snowbird" temporary positions discussed hereafter.

On July 6, 1994, the District Court denied the State Respondents' motion to dismiss holding that the *Rutan* decision covered the plaintiff, but the District Court granted the State Respondents qualified immunity holding that the law was not clearly established that temporary employees were covered by *Rutan*.

After that, the State Respondents indicated they had to fill temporary highway maintainer positions for the upcoming snow season. These positions, commonly known as "snowbirds," include both six month full-time temporary positions and "on call" positions. Petitioner then asked for a hearing on a motion for preliminary injunction. After the hearing on that motion on August 31, 1994, the District Court denied that motion because the State Respondents had complied with the District Court's ruling that the temporary highway maintainer position was protected by *Rutan*, but testimony at the hearing laid out the system the State had used prior to July 6, 1994, to fill the temporary positions.

At the hearing, Respondent William Pearman, described how the patronage system for temporary employees worked. In May of 1991, the Edgar administration determined that *all temporary employees* would be treated as exempt from the holding in *Rutan v. Republican Party*, 497 U.S. 62, 110

S.Ct. 2729 (1990). By exempting all temporary positions partisan political considerations governed the filling of those positions.

IDOT used six month temporary positions and on-call temporary positions for the snow season. For each of the 1991-92, 1992-93 and 1993-94 snow seasons, Pearman used the same system to fill the temporary positions: he ran the name of each employee who had worked the previous year by the employee's Republican County Chairman. If the County Chairman approved that employee being called back to work, he or she was called back to work (provided the employee had a commercial driver's license and passed an IDOT physical which consisted of drug and alcohol screening and a vision test). It was not a requirement that the temporary highway maintainer pass the eligibility test given by the Illinois Department of Central Management Services (CMS) for the position of highway maintainer.[6]

If the Republican County Chairman did not want a particular employee returned to work, that person was not called back to work. If there was a vacant temporary position, the Republican County Chairman had to approve the person selected for the position. The Republican County Chairman either selected a person or the name of a person was run by the Republican County Chairman for the Chairman's approval.

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[6] CMS administers a test to determine eligibility for the position of permanent highway maintainer and then puts those persons qualified on an eligibility list. The permanent highway maintainer positions were filled off the eligibility lists. Those taking the CMS test could indicate on the application form that they were willing to work on a temporary basis, but Pearman did not look at the CMS forms or eligibility lasts. There were thousands on the CMS eligibility list for highway maintainer.

Pearman did not look at performance evaluations (although evaluations were done each year) before calling the Republican County Chairmen. Usually he had no idea of the employee's work performance. He made no inquiry of IDOT's districts to see if the district wanted a particular employee to return to work. The temporary employee did not even have to fill out an application for employment if the County Chairman selected him.

When he had vacant temporary positions, Pearman did not use the CMS counseling service or the Department of Employment Security system, both of which made the public aware of the availability of State jobs.

Randy Vickery also testified at the hearing on the preliminary injunction. He had worked as a highway maintainer in IDOT's Shawnee Yard since June of 1990. He served as the Chairman of the Gallatin County Republican Central Committee from March 1990, to March, 1992. While he was County Chairman he called Pearman's office and told him the persons he wanted selected as temporary highway maintainers.

According to Randy Vickery, the Republican County Chairmen had meetings and were informed by the Governor's Office that they could "appoint" the temporary positions.

The Petitioner, Gary Vickery, is Randy Vickery's brother. Randy Vickery selected the Petitioner as a temporary highway maintainer when he was the Republican County Chairman. The Petitioner worked as a temporary highway maintainer form October, 1991, to March, 1992. After Randy Vickery ceased to be a Republican County Chairman in March, 1992, Petitioner was not returned to work as a temporary highway maintainer.

In Governor Thompson's last snow season, 1990-91, there were seven hundred fifty temporary highway maintainers for the snow season. By the 1993-94 snow season the number had grown to one thousand one hundred thirty-three. Respondent Brown projected growth of another one hundred for the 1994-95 snow season. And these are the numbers of temporary employees in only one position in only one department under the jurisdiction of the Governor.

In May of 1992, under the above-described system of filling temporary positions, Gene Bethel began to work as a temporary highway maintainer in place of Petitioner. That position was not advertised or posted in any way.

D. *Basis For Jurisdiction In The Lower Courts.*

The cause arose under 42 *U.S.C.* §1983. The United States Court for the Southern District of Illinois had jurisdiction under 42 *U.S.C.* §§1331, 1343.

On July 6, 1994, the District Court granted the Party Respondents' motion to dismiss on the grounds the party's activities were protected by the First Amendment to the United States Constitution. The District Court denied the State Respondents' motion to dismiss holding *Rutan* covered temporary highway maintainers but held the State Respondents were entitled to qualified immunity because the law was not clearly established that *Rutan* applied to temporary employees. (C-1, *et seq.*)

The case then proceeded against the State Respondents on injunctive and declaratory relief.

On December 6, 1995, the District Court entered a final judgment reaffirming its prior rulings including certification of two plaintiff classes. (B-1, *et seq.*)

On November 22, 1996, the Seventh Circuit Court of Appeals affirmed the District Court.[7]

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO DETERMINE WHETHER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS A POLITICAL PARTY'S PARTICIPATION IN A PATRONAGE SYSTEM WHEREBY THE PARTY, THROUGH ITS COUNTY CHAIRMEN, SELECTS PERSONS FOR PUBLIC EMPLOYMENT.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160 (1993), this Court rejected a "heightened pleading standard" for cases filed under 42 *U.S.C.* §1983 and citing *Conley v. Gibson*, 355 U.S. 41 (1957), held:

> "[T]he Federal Rules of Civil Procedure *do not require a claimant to set out in detail the facts* upon which he bases his claim. To the contrary, *all the Rules require is 'a short and plain statement of the claim'* that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.*, at 47 (footnote omitted). 113 S.Ct. at 1163. (emphasis added)

Petitioner respectfully submits that his Complaint gave the Party Respondents notice that Petitioner was claiming the Party Respondents participated in a patronage system that violated Petitioner's First Amendment rights. The

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[7] Another case holding the same as to temporary public employment positions and qualified immunity is *Tarpley v. Jeffers*, 96 F.3d 928 (7th Cir. 1996). The Court of Appeals remanded that case for further proceedings as to standing and the claims against the party defendants.

Complaint alleged the State Respondents delegated to the Party Respondents the actual selection of persons to fill temporary state jobs. The District Court dismissed the Complaint as to the Party Respondents holding that such activity was protected by the First Amendment to the United States Constitution.

Despite the fact that discovery was limited, the evidence adduced and presented at the hearing on preliminary injunction bore out the allegations of the Complaint. *Petitioner stresses this is not a case of the party or a party official simply making a recommendation* but rather the State Respondents and the Party Respondents engaged in a system whereby the county chairmen of the party named the persons selected for temporary positions. The head of personnel at IDOT testified he ran the name of each snowbird who had worked the previous year by that employee's county chairman. If the chairman rejected him he was not called back to work—no matter how good his performance had been. If there were a vacancy for a temporary highway maintainer the chairman named the person or approved him. Randy Vickery testified that when he was county chairman he selected the temporary employees, that he had been at county chairmen's meetings with employees of the Governor's Office where he was told that he could "appoint" the temporary employees.

Petitioner contends *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970), and its progeny govern this case. In *Adickes*, a white woman was denied food service in the defendant's restaurant because she was accompanied by blacks. She also was arrested. She sued under 42 *U.S.C.* §1983. The defendant in *Adickes* was a private party just as Respondents Roberts and the Central Committee are in this case.

This Court, in reversing summary judgment for the defendant in *Adickes*, held:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a *Kress employee*, in the course of employment, *and a Hattiesburg policeman somehow reached an understanding* to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.
>
> The *involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful*; *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); see *United States v. Classic*, 31 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); *Screw v. United States*, 325 U.S. 91, 107-111, 65 S.Ct. 1031, 1038-40, 89 L.Ed. 1495 (1945); *Williams v. United States*, 341 U.S. 97, 99-100, 71 S.Ct. 576, 578-579, 95 L.Ed. 774 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. *To act under color of law does not require the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.*" 90 S.Ct. at 1605-1606 (emphasis added)

What happened in *Adickes* is what happened in this case, namely, that the Party Respondents and the State Respondents reached an understanding that temporary positions, including temporary highway maintainers, would be filled on a political basis. The Complaint gave notice to the Party

Respondents that Petitioner was claiming the State Respondents had delegated selection to the Party Respondents. Defendants Roberts' and the Party's involvement in the patronage scheme in this case is not protected by the Constitution.[8] Their very involvement is in a scheme that is just as unconstitutional as the scheme which was at issue in *Adickes*. The scheme in this case allowed the party to fill hundreds and hundreds of positions.

This Court reaffirmed the *Adickes* holding in *Dennis v. Sparks*, 449 U.S. (1980). In that case private parties bribed a judge in order to obtain an injunction. This Court said:

> As the Court of Appeals correctly understood our cases to hold, to act "under color of" state law § 1983 purposes does not require that the defendant be an officer of the State. *It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966). 101 S.Ct. at 186 (emphasis added).

This Court went on to grant the judge immunity but refused to extend immunity to the private persons acting with the judge. See also *United States v. Price*, 383 U.S. 787 (1966); *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922 (1982).

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[8] This is not a case that interferes with the Party's membership, *National Ass'n. For A. of C.P. v. State of Alabama*, 357 U.S. 449 (1958), nor the Party's ability to support certain candidates, *Colorado Repub. Campaign Comm. v. FED.*, ___ U.S. ___, 135 L.Ed. 795 (1996), *Eu v. San Francisco Cty. Democratic Cent. Com.*, 489 U.S. 214 (1989), *Buckley v. Valeo*, 424 U.S. 1 (1976). Party matters remain under Party control. That is simply not what is at issue in this case.

In this case the District Court held there had to be the transfer of legal authority to the party in order for plaintiffs to prevail. The State simply could not transfer signature authority on the personnel transaction forms to a party official, but this Court held in *Dennis* that it was not necessary for the defendant to be an officer of the state in order to be held liable. In *Adickes*, the private party (the Kress employee) did not arrest the plaintiff; the police officer did. But that did not exempt the private party from liability.

Plaintiff submits that every involvement of a private person with state employees will involve speech and association. There has to be association in order to have the private person acting under color of law. Clearly that underlay the facts in *Adickes* and *Dennis*. But the First Amendment does not protect speech or association for an illegal or unconstitutional end.[9] Therefore, Defendants Roberts' and the Party's association with the State Defendants in filling these positions is not protected by the First Amendment because it is association in an unconstitutional scheme.

There is an additional legal theory that deserves mentioning in regard to the dismissal of the Party Respondents. The Party Respondents claim their actions are protected by the First Amendment. When a person is a public employee and brings suit alleging violation of his free speech rights, the first issue the Court must address is whether the speech is of public concern. *Connick v. Myers*, 461 U.S. 138 (1983) and its progeny. If the speech is not of public concern, it is not protected by the First Amendment. In *Connick*, this Court stated:

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[9] Had this been an exempt from *Rutan* position consulting with, or even delegating to, Defendants Roberts and the Party may be constitutional. (Whether it would be legal under the Illinois Personnel Code is a different issue.)

> whether an employee's speech addressed a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the record as a whole. 461 U.S. at 147-148.

The Seventh Circuit has noted content is the greatest single factor. *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984).

In sponsoring highway maintainers in this case, the Party Respondents were not engaging in vigorous public advocacy. It was a quiet, behind the scenes communication regarding hiring of a particular political supporter for a particular state job. Petitioner contends this served a private end, not a public purpose.

Petitioner urges this Court to grant the petition in order to determine this important constitutional issue: whether or not the party's virtual selection of temporary public employees is protected by the First Amendment to the United States Constitution.

II.

UNDER THE FACTS OF THIS CASE THE STATE RESPONDENTS SHOULD NOT BE ENTITLED TO QUALIFIED IMMUNITY.

In this case the Court of Appeals held:

> . . . we decline to find the State Defendants are bound by their public actions or pronouncements and thus lose the protection of qualified immunity. (App. A-12)

Petitioner submits that this holding flies in the very face of the purpose of qualified immunity which was designed to balance the vindication of constitutional rights with the exercise of discretionary functions of public officials.

> In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz, supra*, 438 U.S. at 507-508, 98 S.Ct. 2911-12, as in *Scheuer*, 416

> U.S. at 245-248, 94 S.Ct. At 1691-1692, we relied on the assumption that this standard would permit *"[i]nsubstantial lawsuits* [to] be quickly terminated." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (emphasis added)[10]

Justice Brennan wrote in the concurring opinion in *Harlow*:

> I agree with the substantive standard announced by the Court today, imposing liability when a public official "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 2737, 2739. This standard would not allow the official who *actually knows* he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. *Ante* at 2739, n.33, 457 U.S. at 820.

Petitioner respectfully submits that the State Respondents were bound by the Executive and Administrative Orders of the Governors of the State of Illinois. Those Orders demonstrate what the State Respondents actually knew: that the filling of temporary non-policy-making, non-confidential positions on a political basis violated *Rutan*.

The Administrative Order of Governor Thompson issued on July 17, 1990, applied the *Rutan* decision to *all* "non-policy-making employees." It went on to order *"All hiring* . . . should be based on the merit and qualifications of the candidates . . . . *No hiring* . . . may be decided on the basis of the candidate's party affiliation and support." (emphasis added)

In January of 1991, Governor Edgar issued his first Administrative Order reaffirming Governor Thompson's Administrative Order. Governor Edgar further said:

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[10] The claim in this case is hardly insubstantial.

> *The exception for policy making or confidential employees or spokespersons established in earlier cases also applies to the Rutan ruling . . . .*
>
> *All hiring . . . affecting non-exempt individuals shall be based on the merit and qualifications of the candidates.* (emphasis added)

It is important that Governor Edgar *defined exempt positions as policy-making or confidential or spokesperson positions*. The hiring into all other positions was to be based on merit. There was no distinction as to civil service or non-civil service positions or as to temporary or permanent positions in any of those Executive or Administrative Orders. The operative words are "all hiring" (other than the exempt as defined in the Order).

The Administrative Order of 1991 stressed that *Rutan* protection was not related to whether or not the employee had the protection of the Illinois Personnel Code; the temporary highway maintainer position in this case is not protected by the Illinois Personnel Code.

Governor Edgar's administration settled the *Rutan* litigation in the spring of 1992 as a class action. None of the employment classes referred in any way to duration of employment of the members of the classes.

The settlement required the Administration to publicly publish a list of *Rutan* exempt positions which the Administration did in March of 1992. Neither the temporary nor the permanent highway maintainer positions appeared on that list. The settlement also required a posting of *Rutan* exempt positions within each department under the jurisdiction of the Governor. Neither the temporary nor the permanent highway maintainer positions appeared on the exempt list posted at IDOT.

Petitioner respectfully submits qualified immunity was not intended to protect public officials, who are bound by

public Executive and Administrative *Orders* that "*all hiring*" except "policy-making or confidential employees or spokespersons established in the earlier cases" are protected by *Rutan*, but who privately violate those Orders.

Petitioner respectfully submits qualified immunity was not intended to protect public officials, who are bound (by the settlement agreement) to list *all* exempt from *Rutan* positions in two places: 1) the public list of all exempt positions under the jurisdiction of the Governor; 2) the list of all exempt positions within each department under the jurisdiction of the Governor, but who do not list the temporary highway maintainer position on either list; but then proceed to fill the temporary highway maintainer position politically.

The Executive and Administrative Orders correctly stated the law. The State Respondents are bound by those Orders. The State Respondents were bound by the terms of the *Rutan* settlement agreement. Those Orders and that agreement correctly state what the State Respondents knew. Under the circumstances of this case, the State Respondents should not be entitled to qualified immunity. To allow the State Respondents qualified immunity is to make a mockery of the doctrine of qualified immunity.

III.

THE STATE RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE IT HAS BEEN CLEARLY ESTABLISHED LAW SINCE 1972 THAT DURATION OF EMPLOYMENT DOES NOT AFFECT FIRST AMENDMENT RIGHTS.

It has been settled law since 1972 that the duration of public employment does not affect a public employee's First Amendment rights. In fact, it was not until *Rutan* that patronage issues regarding civil service employees (employ-

ees with the right to be dismissed only for cause) were raised.

In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Plaintiff was a junior college professor and had worked pursuant to a series of one year employment contracts. After the Plaintiff was publicly critical of the college's administration he was not offered further employment. Just as in this case the employment was of limited duration.

This Court held *the threshold question in Perry was whether the Plaintiff's lack of contractual or tenure right to employment defeated his First Amendment claim*. The Court answered, "no," to that threshold question.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible. 408 U.S. at 597

In *Perry*, the college had absolutely no obligation to offer the plaintiff further employment. But if the college did not offer him employment for a limited term due to his exercise of First Amendment rights, the college was liable. That decision is right on point with this case.

The duration of employment issue was also present in *Elrod v. Burns*, 427 U.S. 347 (1976), in which this Court relied heavily upon *Perry*. This Court described the plaintiffs as follows:

> . . . respondents (plaintiffs), all Republicans, were employees of the Cook County Sheriff's Office. *They were non-civil-service employees and, therefore, not covered by any statute, ordinance or regulation protecting them from arbitrary discharge*. 427 U.S. at 350 (emphasis added)

The plaintiffs in *Elrod* were, in one sense, more temporary than the temporary position in this case. They were literally "at will" employees whereas the temporary highway maintainer position usually ran for six months.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the plaintiffs were Assistant Public Defenders "who serve at his [the Rockland County Public Defender's] pleasure" 445 U.S. at 508. When the political affiliation of the Public Defender changed, the Democrat moved to fire the plaintiffs, both of whom were Republican. The plaintiffs, who served at the pleasure of their supervisor, could have been fired for no reason, but this Court held they could not be fired for exercising their First Amendment rights of freedom of association or non-association.

Thus, prior to *Rutan* the patronage cases dealt with non-civil service positions, positions that were temporary in the truest sense of the word. That is completely understandable. In fact, it is the very nature of the "temporariness" of employment that benefits the patronage system. If an employee can be fired at any time without cause, chances are that employee will perform the political work and make the political contributions in order to keep the job. Plaintiff doubts a public official would have the gall to defend a civil service employment decision on the basis of patronage in a public hearing before a civil service commission. A temporary employment system is the system most beneficial to patronage. Therefore, it is not surprising that *Elrod* and *Branti* arose in the temporary employment context.

The named plaintiffs in *Rutan v. Republican Party*, 497 U.S. 62 (1990) were a mix. Rutan and Taylor held positions protected by the personnel code. O'Brien had been laid off from a personnel code position. Standefer had been laid off from a temporary job. Moore had sought a job with the State for years.

In both decisions of the Court of Appeals in *Rutan*, the Court outright reversed the dismissal of Standefer's claim by the District Court. The Court of Appeals treated Standefer, laid off from a temporary position, in exactly the same manner it treated O'Brien who had been laid off from a civil service position. *Rutan v. Republican Party*, 848 F.2d 1396 (7th Cir. 1988):

> Standefer's and O'Brien's claims are more straightforward. Standefer alleges that he was laid off from a *"temporary position"* at the state garage in Springfield along with five other employees. The five other employees, who had the Republican Party's support were offered other state jobs. Standefer was not. Resolving all reasonable inferences from these facts in Standefer's favor, these allegations may support a claim that a public employer conditioned Standefer's continued employment with the State upon Standefer's political affiliation. This is the type of conduct found constitutionally impermissible in *Branti* and *Elrod*. (emphasis added)

This Court drew no distinction between the rights of Standefer and the other named Plaintiffs when it held in *Rutan v. Republican Party*, 497 U.S. 62, 64 (1990):

> To the victor belong only those spoils that may be constitutionally obtained. . . .

Justice Stevens' footnote 5 to his Concurring Opinion in *Rutan* makes clear this Court drew no distinction as to duration of employment:

> Neither Justice Scalia nor any of the parties suggests that party affiliation is relevant to any of the positions at stake in this litigation—rehabilitation counselor, road equipment operator, prison guard, dietary manager and *temporary* garage worker. 497 U.S. at 91, fn. 5

Petitioner in this case was in exactly the same position as Standefer. His six month temporary position ended. His "sponsor" was no longer the County Chairman. He was replaced through the patronage system.

Petitioner submits that *Elrod*, *Branti* and *Rutan* clearly established that it is the *nature of the work* of the position, *not the duration*, that determines whether the position is exempt from *Rutan*. In this case the State Respondents admit that due to the nature of the work of the highway maintainer position the permanent position is not exempt from *Rutan*. Hence, the temporary position with exactly the same duties cannot be exempt under *Elrod*, *Branti* and *Rutan*. The State Respondents should not be entitled to qualified immunity.

IV.

THE COURTS OF APPEAL ARE SHARPLY DIVIDED ON THE ISSUE OF QUALIFIED IMMUNITY IN PATRONAGE CASES.

In this case the Court of Appeals held:

> Although the Plaintiff claims that *Elrod*, *Branti* and *Rutan* "clearly established" that it is the nature of the work, rather than duration of the position, that determines whether a position may be filled using political considerations, we disagree. (App., A-9)

In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), the Court of Appeals for the Sixth Circuit held that qualified immunity depended on the *nature of the position*.

> *There can be no doubt about the essence of the rough distinction that the Supreme Court was trying to create in the Elrod - Branti - Rutan trilogy of cases: "grunt" or "line" workers are entitled to First Amendment protection*, but workers analogous to a cabinet secretary to a chief executive, along with the confidential advisors and administrative assistants of such executive and cabinet secretaries, are not entitled to First Amendment protection. See *Juarbe-Anguoira v. Arias*, 831 F.2d 11, 13 (1st Cir.); 97 F.3d at 1556. (emphasis added)

In *McCloud*, the defendant was appointed the County Auditor when the incumbent Auditor resigned after being criminally convicted. The defendant then fired several employees in the office, nine of whom sued. The District Court granted certain aspects of the defendant's motion for summary judgment but denied that part of the motion based on qualified immunity. The defendant took an interlocutory appeal.

The Court of Appeals reviewed certain principles of law governing qualified immunity: 1) when the law is unclear public officials performing discretionary functions are entitled to qualified immunity in their individual capacities; 2) the burden of proof on qualified immunity belongs to the plaintiff; 3) the government's proffered justifications for patronage practices must satisfy strict scrutiny. 97 F.3d at 1542.

The Court held that the issue of strict scrutiny need no longer concern the District Courts or the Courts of Appeal because this Court has determined:

> that patronage is constitutionally permissible only where political affiliation is an appropriate qualification for the particular employment positions involved. . . . Now the lower federal courts need only apply this *Branti* test; they do not have to apply strict scrutiny in each individual case. "In *Branti*, we said that a state

> demonstrates a compelling interest in infringing First Amendment rights only when it can show that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Rutan v. Republican Party*, 497 U.S. at 71. 97 F.3d at 1543.

After extensive discussion of the applicable principles of the law, the Court of Appeals held that it had jurisdiction to determine *de novo* whether "the law was not sufficiently clear that Plaintiff's positions did not fall into the *Branti* exception." 97 F.3d at 1546.

> As of May 23, 1992, when Testa began dismissing the plaintiffs in this case, there was a sizable body of law in the Supreme Court and the Sixth Circuit addressing the First Amendment rights of workers for whom political affiliation was not a requirement of job performance. *Elrod* first defined the exception to the constitutional ban on adverse employment actions taken against public workers based on political patronage as embracing only confidential and policymaking positions. *Elrod*, 427 U.S. at 367, 96 S.Ct. At 2686-87. When the plurality opinion in *Elrod* was adopted by a majority of the Supreme Court in *Branti*, however, this test was modified: "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. At 1294. Nevertheless, the old labels remain, and for the most part, remove First Amendment protection from the same class of jobs. 97 F.3d at 1553.

The Court then held:

> We can easily dispense with Testa's argument that uncertainty about the facts relevant to where to place the employment positions at issue with respect to *Branti* leads to the conclusion that he is entitled to qualified immunity. *Testa is entitled to qualified immu-*

> *nity only if the law is unclear, not the facts.* 97 F.3d at 1556. (emphasis added)

The Court then held:

> *Before a government defendant in an interlocutory appeal case such as this can argue that legal haziness triggers qualified immunity, it must be factually undisputed that the employee in question is not what we refer to here, for lack of a better term, as a "grunt" worker.* 97 F.3d at 1556. (emphasis added)
>
> . . . We reject the notion that there must be a separate patronage decision by the Supreme Court or the Sixth Circuit involving a particular position before qualified immunity can be denied in such a case. 97 F.3d at 1556.

To hold otherwise, the Court of Appeals held, would be to create an almost absolute bar to recovering damages in patronage cases.

The Court then held the defendant was not entitled to qualified immunity as to five of the nine plaintiffs, but was entitled to qualified immunity as to one position. The Court based its decision upon the nature of the duties of the positions. The Court remanded the case to the District Court to further determine the duties of four of the other plaintiffs so that the issue of qualified immunity could be properly determined based on the nature of the position.

In this case, the temporary highway maintainer position was, indeed, a "grunt" position. The State Respondents agreed the permanent highway maintainer position was protected by *Rutan*—and further admitted the duties of the temporary position were *identical* to the duties of the permanent position.

Plaintiff submits that had he lived in the Sixth Circuit the State Respondents would not have been entitled to qualified immunity. The vindication of constitutional rights

of public employees, particularly First Amendment rights, should not depend on where a public employee happens to reside. The Petitioner urges this Court to grant the writ in order to resolve this conflict between the Courts of Appeal.

CONCLUSION

For these reasons a Writ of Certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 96-1055 and 96-1163

GARY VICKERY,

Plaintiff-Appellant, Cross-Appellee,

v.

JANELL JONES, WILLIAM PEARMAN and KIRK BROWN,

Defendants-Appellees, Cross-Appellants,

and

SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and WILLIAM ROBERTS,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois, Benton Division.
No. 93 C 4030—**James L. Foreman**, *Judge.*

ARGUED SEPTEMBER 6, 1996—DECIDED NOVEMBER 22, 1996

Before CUMMINGS, BAUER and KANNE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* On January 27, 1993, plaintiff Gary Vickery brought this action against certain Illinois state officials (the "State Defendants") and certain members of the Illinois Republican Party (the "Party Defendants"), alleging that the State Defendants and Party Defendants acted under color of law in violation of 42 U.S.C. §§1983 and 1988 in maintaining and operating a political patronage system in which political and financial supporters of the Republican Party of the State of Illinois are favored in regard to state employment as highway maintainers

and alleging that his failure to be appointed to a temporary highway maintainer position violated his rights under the First and Fourteenth Amendments. Vickery represents two plaintiff classes: (i) Class A, consisting of all persons denied the position of temporary highway maintainer with the Illinois Department of Transportation ("IDOT") on the basis of political affiliation, who contend that IDOT's consideration of political affiliation in appointing temporary highway maintainers violated their First and Fourteenth Amendment rights under the Supreme Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, and (ii) Class B, consisting of all persons denied the position of permanent highway maintainer on the basis of political affiliation, who contend that the use of temporary highway maintainers was a scheme to circumvent the *Rutan* decision.

On July 6, 1994, the district court issued an opinion and order denying the State Defendants' motion to dismiss the plaintiff's claims for failure to state a claim, but granting the State Defendants qualified immunity as to the plaintiff's request for monetary damages. *Vickery v. Jones*, 856 F. Supp. 1313 (S.D. Ill. 1994). At the same time, the court granted the motion of the Party Defendants to dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted against them. *Id.* On December 6, 1995, the court entered a declaratory judgment on the pleadings in favor of the plaintiff to the effect that the "defendants' use of political affiliation as a criterion for hiring temporary highway maintainers is unconstitutional" under the *Rutan* decision, but entered a final judgment on the pleadings in favor of the State Defendants on all of the plaintiff's other claims for monetary, injunctive and declaratory relief. *Vickery v. Jones*, No. 93 C 4030, final judgment at 2 (S.D. Ill. Dec. 6, 1995).

Plaintiff appeals the district court's denial of other injunctive and monetary relief against the State Defendants and its final judgment in favor of the Party Defendants. The State Defendants cross-appeal the district court's entry of the declaratory judgment in favor of plaintiff. We affirm.

I.

The following facts are undisputed: IDOT is responsible for the design, construction and maintenance of roadways across the State of Illinois. During the winter season, those responsibilities include the removal of snow and ice from the State's roadways. To fulfill its responsibilities, IDOT uses a workforce of both permanent, full-time "highway maintainers" and highway maintainers who have been appointed to temporary, seasonal positions. Temporary highway maintainers perform the same duties as permanent highway maintainers when they are working, but they do not receive certain traditional benefits of State employment, such as health insurance coverage, pension plan participation or vacation time. During the 1990-91 snow season, IDOT hired 750 temporary highway maintainers for the season. By the 1993-94 snow season, such number had grown to 1,133.

In 1990, the Supreme Court held in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, that public employers could not base promotion, recall, transfer or hiring decisions on political affiliation or political support, except with respect to certain policy-making positions for which political affiliation is an appropriate requirement. Immediately following the decision in *Rutan*, then Illinois Governor Thompson declared in an Administrative Order that "No hiring or other personnel decisions—including promotions, transfers or recalls from layoff—may be decided on the basis of the candidate's party affiliation or support." Administrative Order No. 1 (1990). After Jim Edgar became Governor of Illinois in 1991, he reaffirmed and adopted Governor Thompson's Administrative Order No. 1. In May 1991, Governor Edgar determined that temporary employees would be treated as exempt from the holding in *Rutan*, with the result that political considerations could be taken into account in filling those positions. In 1992, the parties in the *Rutan* litigation reached a settlement upon remand to the district court. The settlement included an undertaking by the State to publish a list of positions that were exempt from the *Rutan* holding and Adminis-

trative Order No. 1. The position of temporary highway maintainer did not appear on that list of positions.

The State Defendants admit that, prior to July 5, 1994, "they considered a variety of factors in awarding temporary highway maintainer positions in IDOT, including but not limited to prior work experience at IDOT, recommendations or referrals from a variety of sources, and affiliation with or support by representatives of the Republican Party." At a hearing on August 31, 1994, defendant William Pearman, head of the Office of Personnel at IDOT, described how the position of temporary highway maintainer was filled. He testified that for the snow seasons following May 1991 through July 1994, he used the same system to fill the temporary positions. First, in most cases, he ran the name of each emp')yee who had worked the previous year by the employee's Republican County Chairman. If the County Chairman approved, the employee was called back to work so long as certain prerequisites (such as a valid commercial driver's license, drug test and a physical) were satisfied. If the County Chairman did not approve, in most cases that person was not called back to work. If there was a vacant temporary position, the County Chairman was often notified, and then, in most cases, either the County Chairman referred a person to IDOT or the name of a candidate was submitted to the County Chairman for approval.

Randy Vickery, plaintiff's brother, was Chairman of the Gallatin County Republican Central Committee from March 1990 to March 1992. While he was County Chairman, he called Pearman's office and told him the persons he wanted selected as temporary highway maintainers and was involved in the selection of plaintiff as a temporary highway maintainer. Gary Vickery worked in that capacity from September 30, 1991, to March 31, 1992, at IDOT's shed at Harrisburg, Illinois. The parties agree that he performed his duties in an acceptable manner. However, in April 1992, at the expiration of Gary Vickery's contract, William Eugene Bethel was awarded a six-month contract as temporary highway maintainer instead of Vickery. That

position was not advertised or posted in any way. Randy Vickery had ceased to be Republican County Chairman in March 1992.

Since the district court's July 6, 1994 opinion, the State Defendants have taken action to end the policy of considering political affiliation in the selection of temporary employees. Governor Edgar's chief counsel issued a new policy to all agency directors and their chief legal counsel, prohibiting the hiring or firing of temporary employees based on political affiliation, and IDOT established new procedures to fill vacant temporary highway maintainer positions, including the posting of available temporary highway maintainer positions at IDOT facilities around the State. Additionally, an application and evaluation process has been established that does not consider political affiliation.

II.

This Court has recently decided the case of *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996), which raised issues similar to those raised in this case. In 1992, Tarpley applied for a permanent job as a power plant maintenance worker at an Illinois state-run facility. He was denied the job in favor of Harold Blessing, who had been filling the job for several months on a temporary basis upon the recommendation of a Republican County Chairman. Tarpley alleged that Blessing obtained the temporary position as well as the permanent position because of his affiliation with the Republican Party, in violation of Tarpley's First Amendment rights.

The district court in *Tarpley* granted summary judgment to all defendants. With respect to the filling of permanent positions, the court held, and we agreed, that (i) Tarpley had not shown that he would have been given the job but for Blessing's political affiliation, because other interviewees had received higher rankings in the interviewing process, and (ii) Tarpley had not presented sufficient evidence of a scheme on the part of Illinois officials

to avoid the dictates of *Rutan* by using interim positions rather than filling permanent positions. *Id.* at 929-930. With respect to temporary positions, the district court found that *Rutan* did cover hiring for temporary positions, but that the state officials were entitled to qualified immunity because the *Rutan* constitutional principle was not clearly established at the time of the claimed constitutional violation. This Court agreed, but remanded for a determination of Tarpley's standing. *Id.* at 923-924, 927. However, the Republican Party defendants in *Tarpley* had failed to argue any basis for claiming qualified immunity or any other defense. Instead, they had argued that *Rutan* did not apply to the filling of temporary positions and that the state officials were protected by qualified immunity. We therefore reversed the grant of summary judgment as it pertained to the Republican Party defendants and remanded for a determination of the merits. *Id.* at 924.

III.

The plaintiff classes first argue that the district court erred by concluding that the State Defendants were entitled to qualified immunity when they considered political affiliation in filling the position of temporary highway maintainer. Second, they challenge the district court's judgment in favor of the State Defendants with respect to the Class B plaintiffs' claim that temporary full-time positions were deliberately used to avoid filling permanent, full-time positions in contravention of *Rutan*. Finally, they assert that the district court erred when it concluded that plaintiff had failed to state a claim against the Party Defendants upon which relief could be granted. Each argument will be addressed in turn.

A.

The plaintiff first challenges the district court's holding that the State Defendants were entitled to qualified immunity when they filled temporary highway maintainer positions by considering the political affiliation of the can-

didates. In *Tarpley v. Jeffers*, 96 F.3d 921, 927, this Court laid out a three-level inquiry applicable to this type of case:

> First, is patronage hiring unconstitutional in the circumstances of this case? Second, if so, was the unconstitutionality clearly established or are the state defendants entitled to qualified immunity? Third, did [the plaintiff] suffer an injury by virtue of the defendants' actions?

If this Court finds in answer to the second inquiry that the State Defendants were entitled to qualified immunity, then, whatever the answers to the first and third inquiries, our inquiry ends, because the district court has addressed the first inquiry, finding that the State Defendants' consideration of political affiliation in hiring temporary highway maintainers was unconstitutional, and its finding is not challenged on appeal. Similarly, if the State Defendants are entitled to qualified immunity, the third inquiry becomes irrelevant because seeking damages against them is prohibited, even if the plaintiff suffered an injury by virtue of the State Defendants' actions.

Qualified immunity shields government officials who are performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818. Whether the State Defendants will be protected by qualified immunity "turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S., at 819, assessed in light of the legal rules that were 'clearly established' at the time it was taken, *id.*, at 818." *Anderson v. Creighton*, 483 U.S. 635, 639. As the Court stated in *Anderson*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously

> been held unlawful, . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted). This Court has stated several times that a plaintiff may show that a legal rule was "clearly established" by either providing a "closely analogous" case covering both the right at issue and its application to the facts of the case at hand or showing that a reasonable person would have known that they were violating the law because such violation was so obvious. *See Erwin v. Daley*, 92 F.3d 521, 525 (7th Cir. 1996); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994); *McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992); *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc), certiorari denied, 488 U.S. 968.

The plaintiff asserts that *Branti v. Finkel*, 445 U.S. 507; *Elrod v. Burns*, 427 U.S. 347; *Perry v. Sindermann*, 408 U.S. 593; and *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), certiorari denied, 410 U.S. 928, are analogous to the case at hand and "clearly established" that patronage hiring in filling temporary positions is unconstitutional. However, each of these cases involved the discharge of a full-time non-civil service employee based on political association. The plaintiff submits that these non-civil service employees are temporary employees, like the temporary highway maintainers, because they could be fired for any reason or no reason at all. In other words, they had no legal entitlement to continued employment. Similarly, the plaintiff contends that the plaintiff in *Perry* held a temporary position analogous to the temporary highway maintainer position because he was a state college teacher without any contractual or tenure right to re-employment, and the plaintiff points out that the Supreme Court held that such lack of right was immaterial to his right to bring a First Amendment claim. 408 U.S. at 597. The plaintiff's attempt to analogize *Branti*, *Elrod*, *Perry* and *Lewis* to the facts of this case is not persuasive. We seriously question whether the Supreme Court and this Court really believed that

they were addressing the constitutionality of patronage hiring for positions like the temporary highway maintainer in this case, which positions are clearly defined as short-term, when they were deciding the constitutionality of patronage hiring or firing for full-time non-civil service positions in *Branti*, *Elrod*, *Perry*, and *Lewis*.

The plaintiff also points out that one of the plaintiffs in the *Rutan* case had been laid off from a temporary position at the state garage, and that the Supreme Court drew no distinction in its opinion as to the duration of employment of any of the plaintiffs in that case. The district court properly rejected this argument, emphasizing that "it was far from clear that the Supreme Court made its decision on that basis." *Vickery v. Jones*, 856 F. Supp. at 1326. The temporary worker in *Rutan* was not challenging a failure to obtain a temporary position; his allegation related instead to the fact that he was not recalled to a new state job after he had been laid off. *Rutan*, 497 U.S. at 67. As the district court pointed out, the fact that the worker's prior status as a temporary worker was mentioned in connection with the *Rutan* decision is not dispositive; "[w]hat is critical is whether the parties *argued* that his status as a temporary employee would affect his claim or whether the Supreme Court expressed any opinion as to whether such status might be relevant." 856 F. Supp. at 1326 (emphasis in original). There is no indication that either occurred. Although the plaintiff claims that *Elrod*, *Branti* and *Rutan* "clearly established" that it is the nature of the work, rather than the duration of the position, that determines whether a position may be filled using political considerations, we disagree.

Prior to the district court's July 6, 1994 opinion, no court had explicitly decided the question whether the protection afforded in *Rutan* extended to temporary workers. This Court had held on several occasions that *Rutan* did not protect independent contractors from hiring or firing based on political considerations. *See, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir.

1995), reversed, 116 S. Ct. 2353; *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), certiorari denied, 502 U.S. 1005. Finding that the position of a temporary worker was more analogous to that of a permanent, full-time worker than that of an independent contractor, the district court held that *Rutan* did extend to temporary workers. *Vickery v. Jones*, 856 F. Supp. at 1325. In light of the Supreme Court's recent decision in *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, which held that government employers may not discharge an independent contractor based on an exercise of its rights of political association or the expression of political allegiance, the State Defendants do not challenge the district court's conclusion on appeal, and we are not required to address the correctness of the district court's conclusion that *Rutan* extends to temporary workers like the highway maintainers at issue in this case.

If we had been presented the question whether *Rutan* extends to the hiring of temporary highway maintainers, perhaps the Court would agree with the plaintiff's assertion that certain language in the *Elrod*, *Branti*, *Rutan* or *Lewis* cases would require an affirmative answer, especially after the *O'Hare Truck Service* decision. However, as we concluded in *Tarpley*, "whatever may be the constitutional status of patronage hiring for temporary positions [after *O'Hare Truck Service*], it was not clearly established at least prior to *O'Hare Truck Service*." *Tarpley v. Jeffers*, 96 F.3d at 927. We simply do not agree with the plaintiff's assertion that the constitutional status of patronage hiring of temporary positions was clearly established at the time of the activities challenged in this case. For the reasons stated above, the plaintiff has not provided a "closely analogous" case that covers both the *Rutan* holding and its application to temporary employment positions like the temporary highway maintainer positions, nor has he shown that using information regarding an applicant's political affiliation was so obviously unconstitutional that the State Defendants should have

known that they were violating the law. Therefore, the district court correctly concluded that the State Defendants were entitled to qualified immunity.

The plaintiff classes also point to certain actions and pronouncements of Illinois officials following the *Rutan* decision that purportedly require this Court to deny the State Defendants the protection of qualified immunity based on equitable considerations, even if we find, as we have, that the patronage hiring practices regarding temporary positions are otherwise protected. They argue that the purpose of qualified immunity—*i.e.*, to "strike[ ] a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions," *Wyatt v. Cole*, 504 U.S. 158, 167—is not furthered when granting qualified immunity would simply "reward deception."

The plaintiff directs our attention to the fact that, as noted above, following the Supreme Court's decision in *Rutan*, then Governor Thompson issued several orders in which he ordered state compliance with that decision. Administrative Order No. 1 (1990) declared that "No hiring or other personnel decisions—including promotions, transfers or recalls from layoff—may be decided on the basis of the candidate's party affiliation or support." After Jim Edgar became Governor of Illinois in 1991, he reaffirmed and adopted Governor Thompson's Administrative Order No. 1. Likewise, the *Rutan* settlement, entered into in 1992, required the State to publish a list of positions that were exempt from the *Rutan* holding and Administrative Order No. 1. Notwithstanding Governor Edgar's determination in mid-1991 that temporary employees would be treated as exempt from the holding in *Rutan* (which was, by itself, at least arguably in contradiction of Administrative Order No. 1), neither the position of temporary highway maintainer nor any other temporary position appeared on such list of positions when it was published in 1992.

The plaintiff in *Tarpley v. Jeffers* made similar arguments regarding the inequity of allowing the Illinois state

officials to claim qualified immunity following such actions and pronouncements. There this Court responded:

> Tarpley implicitly invites us to speculate as to why, if Illinois state officials genuinely believed that temporary positions were exempt from the *Rutan* holding, such positions were never posted on the exempt lists. This might be an interesting question if we were currently conducting an inquiry into compliance with the settlement in the *Rutan* case. Here, however, our job is not to speculate about allegations of non-compliance with a settlement in another case.

96 F.3d at 928.

The plaintiff has not provided sufficient evidence that any deliberate deception was practiced by the State Defendants in their public pronouncements. More importantly, the State Defendants correctly assert that the plaintiff has not cited any authority that would support a finding that the State's public pronouncements affect the State Defendants' entitlement to qualified immunity from federal constitutional claims. Although the consistency of some of the state officials' actions and pronouncements following the *Rutan* decision is questionable, the reasoning employed in *Tarpley* is equally applicable to this case. Therefore, we decline to find that the State Defendants are bound by their public actions or pronouncements and thus lose the protection of qualified immunity.

B.

The plaintiff next challenges the district court's judgment in favor of the State Defendants with respect to the Class B plaintiffs' claims that temporary full-time positions were deliberately used to avoid filling permanent, full-time positions in contravention of *Rutan*. The district court addressed the issues surrounding the Class B plaintiffs in the context of the State Defendants' Motion for Judgment on the Pleadings.

The plaintiff alleges in paragraph 21 of his Complaint that:

> The use of the six month contract to fill the position of highway maintainer rather than filling the position under the Personnel Code is designed to circumvent the United States Supreme Court ruling in [*Rutan*] . . . .

Paragraphs 30 and 33 of the plaintiff's Complaint set forth similar allegations. In each case, the State Defendants have denied the factual allegations. The plaintiff contends that with these allegations, the State Defendants were put on notice that the plaintiff believed that the use of the temporary positions was designed to circumvent *Rutan* because the State Defendants knew that if they filled permanent highway maintainer positions they would have to follow *Rutan*. Without citing any case law, the plaintiff argues that the State Defendants could not, "of course," avail themselves of the protection of qualified immunity if this charge were true. As evidence of such a scheme, plaintiff points to the "dramatic increase" in the use of temporary employees from the 1990-91 snow season to the 1994-95 snow season, and claims that he should have been allowed in discovery to explore how often back-to-back temporaries were used, and then to compare those figures pre-*Rutan* and post-*Rutan*. Thus the plaintiff claims that genuine issues of material fact were raised by the pleadings that precluded the district court's judgment in favor of the State Defendants.

The district court's dismissal for failure to state a claim is reviewed "*de novo*, accepting all the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiffs." *Travel All Over the World, Inc. v. The Kingdom of Saudi Arabia*, 73 F.3d 1423, 1429 (7th Cir. 1996). Accordingly, the factual allegations in the plaintiff's Complaint will be accepted as true and all reasonable inferences will be drawn in the plaintiff's favor, *id.* at 1428, and the Court will dismiss for failure to state a claim when "it appears beyond a doubt that the plaintiff[ ] can prove no set of facts in support of [his] claims that would entitle [him] to relief," *id.* at 1429-1430; *see also Conley v. Gibson*, 355 U.S. 41, 45-46.

The district court found that declaratory relief in favor of the Class B plaintiffs that addressed the motives of the State Defendants in establishing the policy of using political considerations in hiring temporary employees " 'would serve no useful purpose as a final determination of rights.' " *Vickery v. Jones*, 878 F. Supp. 1179, 1188 (S.D. Ill. 1995), *quoting Green v. Mansour*, 474 U.S. 64, 73. Because the district court had already granted declaratory relief to the effect that such policy was unconstitutional, it reasoned that a finding regarding the State Defendants' motives for taking into account political considerations in the temporary employee hiring process would be relevant only if damages were available to the Class B plaintiffs. *Id.* The district court had already found that the State Defendants were protected from an award of damages under the doctrine of qualified immunity. Accordingly, it believed that the State Defendants' motives were irrelevant for purposes of its determination.

The State Defendants first argue that the plaintiff has not provided any evidence that there was any scheme to circumvent *Rutan*. In fact, the only evidence regarding the alleged motives of the State Defendants was provided by defendant Kirk Brown, the Secretary of IDOT, who testified that IDOT's motivation for relying on temporary workers was to save taxpayers' money. More importantly, the State Defendants also assert that their motives in hiring temporary highway maintainers are legally irrelevant. Citing a long list of Supreme Court and Seventh Circuit cases, *see, e.g., Behrens v. Pelletier*, 116 S. Ct. 834, 838; *Harlow v. Fitzgerald*, 457 U.S. at 818; *Erwin v. Daley*, 92 F. 3d at 525; *Anderson v. Romero*, 72 F.3d 518, 521 (7th Cir. 1995); *Gordon v. Degelmann*, 29 F.3d 295, 299 (7th Cir. 1994), they claim that even if we assume that they used temporary employees to circumvent *Rutan*, they are entitled to qualified immunity. Therefore, they argue, no useful purpose is served by inquiring into their motives.

In *Tarpley v. Jeffers*, the plaintiff had similarly claimed that Illinois state officials had filled temporary positions

"as part of a scheme to circumvent the dictates of *Rutan* with respect to the permanent position." 96 F.3d at 927. This Court concluded that the plaintiff had not shown sufficient evidence of such a scheme to avoid summary judgment. *Id.* at 930. As in *Tarpley*, the plaintiff classes in this case have cited some facts from which one could, however theoretically, infer that some type of scheme existed to circumvent *Rutan*. However, they have not shown sufficient evidence of a scheme in order to defeat the dismissal of their claim.

The district court and the State Defendants are correct that an inquiry into the motives of the State Defendants in temporary highway maintainer hiring is legally irrelevant, because the test for qualified immunity is one that is objective rather than subjective. In *Harlow v. Fitzgerald*, the Supreme Court explicitly rejected a subjective, "good faith"/"bad faith" distinction in favor of an objective standard for qualified immunity. 457 U.S. at 815-818. The Supreme Court and this Court have reiterated the objective standard many times since the *Harlow* decision, refusing to consider a defendant's subjective motivation. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 172 (Scalia, J., concurring) ("[M]odern qualified immunity does not turn upon the subjective belief of the defendant."); *Erwin*, 92 F.3d at 524 ("The inquiry focuses on the objective legal reasonableness of the action, not the state of mind or good faith of the officials in question."); *Anderson*, 72 F.3d at 521 ("Proof of spite does not nullify a defense of immunity. The test for immunity is an objective one." (citations omitted)). The plaintiff's assertion that a deliberate scheme to avoid *Rutan* would preclude qualified immunity is simply incorrect. In fact, this type of case falls into that category of cases that led the Supreme Court to reject a subjective standard of inquiry for qualified immunity claims in *Harlow*:

> [I]t is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of of-

> ficials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. . . . Judicial inquiry into subjective motivation [ ] may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government. . . . [B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.

457 U.S. at 816-818. A finding regarding the State Defendants' motives for taking into account political considerations in the temporary employee hiring process would be relevant only if damages were available to the Class B plaintiffs, and, as shown, the district court correctly found that the State Defendants were protected from an award of damages under the doctrine of qualified immunity, regardless of their subjective motivation. Accordingly, the district court rightly determined that the Class B plaintiffs have failed to state a claim upon which relief may be granted.

C.

The plaintiff classes also challenge the district court's dismissal of their claims against the Party Defendants for failure to state a claim for which relief may be granted. The district court's dismissal for failure to state a claim is reviewed under the same standard set forth in Part III.B of this opinion.

The district court found that the *Rutan* decision did not expressly prohibit political parties from disseminating information regarding a person's political affiliation or making recommendations based on such political affiliation. 856 F. Supp. at 1318. Moreover, the court noted that the advocacy that a particular person should be hired is political expression, subject to the protection of the Constitu-

tion. *Id.* at 1318-1319. Accordingly, the court distinguished between the compiling and distributing of political information or the advocacy of the hiring of a particular individual, which is permissible, and the *use* of such political information by the State in making its hiring decisions, which is prohibited by *Rutan*. *Id.* at 1319. Thus it held that the plaintiff's failure to allege that the Party Defendants had actual hiring authority or made actual employment decisions in filling the temporary highway maintainer positions, as opposed to simply making recommendations regarding filling such positions, was fatal to the claims against the Party Defendants.

In response, the plaintiff points out, first, that the complaint in the present case was modeled after the complaint in *Rutan*, and that neither this Court nor the Supreme Court dismissed the claim against the Republican Party defendants in that case. Such an argument might be persuasive if either court had expressly addressed the claim against the Republican Party defendants. However, the district court was correct that the *Rutan* decision did not expressly prohibit political parties from disseminating information regarding political affiliation or making hiring recommendations based on political information. In fact, the Supreme Court did not directly address the plaintiffs' claims against the Republican Party; it only affirmed this Court's judgment reversing the district court's dismissal of the plaintiffs' claims and remanded them for further proceedings. Plaintiff classes' reliance on their complaint being similar to the *Rutan* complaint is simply not dispositive.

The plaintiff also contends that *Adickes v. S.H. Kress and Company*, 398 U.S. 144, governs. In *Adickes*, the plaintiff was a white school teacher who was refused service in a lunchroom when she was accompanied by six african-american students, and was then arrested for vagrancy when she left the lunchroom premises. She filed a complaint under §1983 against both the owner of the lunchroom and the policeman who arrested her, claiming

that a conspiracy existed between those two parties. The Supreme Court held that:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under §1983 if she can prove that a [lunchroom] employee, in the course of employment, and a Hattiesburg policeman *somehow reached an understanding* to deny Miss Adickes service in the [lunchroom], or to cause her subsequent arrest because she was a white person in the company of Negroes. . . . 'Private persons, *jointly engaged with state officials in the prohibited action*, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant in joint activity* with the State or its agents.'

Id. at 152 (citing *United States v. Price*, 383 U.S. 787, 794) (emphasis added); *see also Dennis v. Sparks*, 449 U.S. 24, 27-28; *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941-942. The plaintiff claims that this is what he has alleged regarding the Party Defendants' behavior. The district court in *Adickes* had held that there was no evidence from which to infer a conspiracy, relying on the defendants' denial of a conspiracy and their statements that no communications were made between the two parties regarding the arrest of Ms. Adickes. Nevertheless, the Supreme Court held that it was error to grant summary judgment on the facts because a policeman had been in the lunchroom while Ms. Adickes was waiting for service and the defendants had not disproven the possibility that this policeman had reached an understanding with a lunchroom employee regarding the refusal to serve; thus a genuine issue of material fact did indeed exist as to the existence of a conspiracy.

The plaintiff also argues in the alternative that the Party Defendants may be held liable under 42 U.S.C. §1983 be-

cause they were performing a function usually performed by a public entity, but they cite no case law to support this proposition. In response to the district court's First Amendment problems with plaintiffs' arguments, they assert that the Party Defendants' association with the State Defendants in filling temporary positions is not protected by the First Amendment because it is speech or association for an illegal or unconstitutional end.

First, we cannot agree that the plaintiff has alleged that the State Defendants and Party Defendants had "reached an understanding" or shown that the Party Defendants had been "wilful participant[s] in joint activity with the State or its agents," as contemplated under an *Adickes* analysis. If the action prohibited under *Rutan* is the hiring, promoting, transferring or recalling of an individual based on his or her political association, since the Party Defendants did not hire, promote, transfer or recall anyone, their screening or recommending the hiring of employees for highway maintainer positions is not the same as being "jointly engaged with state officials in the prohibited action." *Adickes*, 398 U.S. at 152.

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, is instructive. The Supreme Court found that the NCAA's conduct in connection with the imposition of penalties, including a suspension, upon Tarkanian, UNLV's basketball coach, did not constitute state action for purposes of §1983, reversing the Nevada Supreme Court. The majority opinion emphasized that it was UNLV, the state actor, that was responsible for the actual suspension of Tarkanian. *Id.* at 193. The Court considered the relevant question similar to the one advanced by the parties here, *viz.*, "[W]hether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action." *Id.* at 193. The Court answered "no," pointing out that UNLV retained the authority to withdraw from the NCAA and establish its own set of rules and enforcement procedures at any time.

The *Tarkanian* reasoning is applicable here. The fact that the State Defendants acted in compliance with the

"rules and recommendations" of the Party Defendants does not turn the Party Defendants' conduct into state action. As stated in *Tarpley*, the plaintiff classes must allege that the Party Defendants "did more than simply make a recommendation to the state officials" that certain individuals be hired to fill the temporary positions; they must claim that the Party Defendants "acted under color of state law by working in concert with the state officials to deprive" them of their constitutional rights. *Tarpley v. Jeffers*, 96 F.3d at 928 n.3. Phone calls whereby the Party Defendants made suggestions as to the filling of temporary positions simply do not suffice to satisfy this standard, for it is noncontroverted that the Party Defendants had no actual hiring authority and did not make the actual employment decision.

Second, for applicant screening to meet the traditional government function test advanced by the plaintiff, a private party defendant would have to be responsible for the hiring of the public employee. As stated above, the plaintiff has neither so asserted nor provided any evidence to that effect. The hiring decisions remained in the hands of the State Defendants. This Court was able to find only a few cases where the Supreme Court had found private action to be a traditional government function in the context of a §1983 case. *See West v. Atkins*, 487 U.S. 42, 56-57 (when State has delegated its constitutional duty to provide medical treatment to a physician with non-exclusive contract with the State, that physician is "acting under color of state law"); *Terry v. Adams*, 345 U.S. 461 (political organization's election machinery violated plaintiffs' Fifteenth Amendment right to vote on account of their race and color); *Marsh v. Alabama*, 326 U.S. 501 (distribution of religious literature cannot be prohibited in company-owned town any more than it could be prohibited in any other municipality); *see also Georgia v. McCollum*, 505 U.S. 42, 51-55 (a criminal defendant's exercise of peremptory challenges constitutes state action for purposes of the Equal Protection Clause, reasoning, in part, that peremptory challenges perform a traditional function

of the government); *cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544-545 (United States Olympic Committee is not performing a governmental function because "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function"). The test for a finding of government action under this theory is whether the defendants have performed functions that have been "traditionally the *exclusive* prerogative" of the government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (emphasis added); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (privately operated school for maladjusted high school students that gets students through referrals by city school committees under a state statute or by state agency is serving a "public function," but education of maladjusted students has not been *exclusively* the prerogative of the state, so its acts are not state action under Fourteenth Amendment). Advocating the hiring of an applicant for employment does not fall into a category of activities that are exclusively the government's, and this Court is persuaded by the Party Defendants' argument that imputing state action to the Party Defendants under the traditional government function analysis would require a similar finding with respect to any other person or entity advocating the hiring of a public employee. Such a result is untenable.

The district court was also correct in its conclusion that the Party Defendants were merely involved in expressing their opinion when they made recommendations with respect to the hiring of certain employees based on political considerations. As with other types of associations, the protection of freedom of speech and association is provided to the Party Defendants by the Constitution. *See N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460. Just as the Constitution protects the right of the Party Defendants to advocate that a specific person be elected to a particular office (*see Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309, 2316; *Eu v. San Francisco*

County Democratic Central Committee, 489 U.S. 214, 223-224; *Buckley v. Valeo*, 424 U.S. 1, 48), the Party Defendants are entitled to advocate the hiring of a specific person to perform a governmental function. Such recommendations are political expression for purposes of constitutional protection. An outcome to the contrary could have the effect of subjecting labor unions and other interest groups, legislators and influential private citizens to claims of unlawful conduct each time they advocated the hiring of a particular individual, even though these entities and individuals are clearly understood to be entitled to engage in political expression and association. *Rutan* is not to the contrary.[1]

IV.

The State Defendants cross-appeal the district court's entry of a declaratory judgment on the pleadings in favor of the plaintiff to the effect that the "defendants' use of political affiliation as a criterion for hiring temporary highway maintainers [was] unconstitutional" under the *Rutan* decision. No. 93 C 4030, final judgment at 2. The State Defendants maintain that the Eleventh Amendment barred any relief against them because they were in complete

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[1] The plaintiff also appears to ask us to explore extending the holding of *Connick v. Myers*, 461 U.S. 138, to the facts of this case. In *Connick*, the Supreme Court held that, in any case alleging the violation of a public employee's free speech rights, the court must first address the issue whether the speech in question is of a public concern. *Id.* at 146; *accord*, *Waters v. Churchill*, 114 S. Ct. 1878, 1884. Plaintiff concedes that he has been unable to find any case that applies the "public concern test" to a private person communicating with or regarding a public employee, nor were we able to do so. The "public concern test" is intended to balance between the competing interests of public employees' free speech rights, on one hand, and the State's interest, as an employer, in promoting the efficiency of the public services it performs through its employees, on the other hand. *Id.* at 142. Therefore, it would be wholly inappropriate to extend the *Connick* holding to the facts of this case.

compliance with the district court's rulings (*i.e.*, they were no longer considering political affiliation in filling the position of temporary highway maintainer) when they moved for judgment on the pleadings on October 4, 1994, and consequently there was no "ongoing" violation of federal law. The district court reasoned that the Eleventh Amendment did not bar such relief as long as the declaration did not operate as a money judgment against the State. *See Vickery v. Jones*, 878 F. Supp. at 1186.

The district court's analysis of the history and purpose of the Eleventh Amendment was entirely competent. By its terms, the Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment operates to prohibit suits against states in federal courts, unless the state has consented in unequivocal terms or Congress unequivocally has expressed its intent to abrogate the immunity and does so through a valid exercise of power. *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122-1123; *Hans v. Louisiana*, 134 U.S. 1. In *Ex parte Young*, 209 U.S. 123, 159-160, the Supreme Court created an exception to the general prohibition on suits by citizens against states, allowing a citizen to sue a state official when that official's action violates federal law. The State Defendants correctly point out that the *Young* exception permits relief against state officials only when there is an ongoing or threatened violation of federal law. *See Seminole Tribe*, 116 S. Ct. at 1132; *Papasan v. Allain*, 478 U.S. 265, 277-278; *Green v. Mansour*, 474 U.S. at 71, 73; *Watkins v. Blinzinger*, 789 F.2d 474, 484 (7th Cir. 1986), certiorari denied, 481 U.S. 1038. Such requirement is intended to maintain the balance between allowing the "federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States,' " *Pennhurst*

State School and Hospital v. Halderman, 465 U.S. 89, 105 (quoting *Young*, 209 U.S. at 160), and upsetting the delicate balance of federal and state interests that is at the heart of the Eleventh Amendment.

The State Defendants have argued that the present issue should be governed by *Watkins v. Blinzinger*, 789 F.2d 474, and *Green v. Mansour*, 474 U.S. 64, which addressed the requirement of an ongoing violation of federal law before a court may enter a declaratory judgment against a state official pursuant to *Young*. In *Watkins*, plaintiffs were AFDC recipients who challenged Indiana's method of calculating the period of AFDC ineligibility. By the time the case was heard in district court, Indiana officials had changed the offending method of calculation to one that satisfied the plaintiffs' concerns. Although this Court found that the case was not technically moot, *id.* at 483, we emphasized that "[w]hen the federal interest is no longer so pressing—when there is no continuing conduct that States must change to comply with federal law—the reason for the rule of *Young* no longer applies," *id.* at 484, so that the Eleventh Amendment barred an entry of a declaratory judgment.[2]

The plaintiffs in *Green v. Mansour* were also AFDC recipients who were challenging Michigan's method for determining a recipient's earned income, which in turn

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[2] In *Dial v. Coler*, 791 F.2d 78 (7th Cir. 1986), certain Illinois officials charged with the implementation of the AFDC program in Illinois were sued regarding AFDC eligibility requirements. The federal laws in question had been changed by the time the case was heard by the court, although the parties argued over whether the state had permanently or temporarily changed its eligibility requirements. We held that although it was an "extremely close case," the fact that "no retrospective or notice relief is available, . . . a federal program has been changed, and . . . new regulations have been promulgated thereunder" gave "reasonable assurance that the questioned conduct will not be resumed." *Id.* at 81. Therefore, we held that the claims of the plaintiffs were not ripe for review without reaching the Eleventh Amendment issue.

determined eligibility for and the amount of AFDC benefits, and sought declaratory relief. While the case was pending, Congress revised the applicable statute to require states to calculate the earned income in the same way that the plaintiffs had requested. Noting that plaintiffs were not at that time claiming that the State was violating federal law and that there was no threat of further violation, the Supreme Court held that a declaratory judgment would be inappropriate because its only purpose at that point would be to resolve a dispute over the lawfulness of past acts, paving the way for a state court to determine the issue of damages or restitution, remedies otherwise prohibited by the Eleventh Amendment. 474 U.S. at 73. The Court reasoned that such an " 'end run' " around the Eleventh Amendment was not permissible. *Id.*

The plaintiff in this case argues that the *Watkins* and *Green* cases are distinguishable from the case at hand. He points out that in *Watkins* the Indiana administrator in charge of public welfare had ordered that such new standard be used, and in *Green* the underlying law had changed in a way that made further violations of law impossible. The plaintiff contrasts the situation of the State Defendants in this case, where no public order or commitment has been given or issued to cease the consideration of political affiliation in temporary hiring. He argues, and the district court agreed, that, unlike the *Watkins* and *Green* cases, no such guarantee of compliance exists here.

The State Defendants claim that the district court ignored the requirement of a "continuing or impending" violation of federal law and focused only on the independent and additional requirement that any declaratory relief cannot operate as a money judgment for past violations against the State. *See, e.g., Papasan*, 478 U.S. at 278; *Green*, 474 U.S. at 106; *Edelman v. Jordon*, 415 U.S. 651, 663. However, the district court did address this concern in its opinion. Although the court did, as the State Defendants point out, find it "unlikely" that the State Defendants would resume their prior practice, it noted that they had not clearly stated their intention to permanently cease using

political affiliation as a criterion in hiring temporary workers. 878 F. Supp. at 1185. The court noted that, following its July 6 opinion holding that *Rutan* extended to protect temporary workers, the State Defendants risked losing their qualified immunity if they did not cease their prior hiring practices. *Id.* at 1186. The court concluded that:

> When a party, in response to an interlocutory order, refrains from engaging in the challenged practice, yet provides no assurance that the moratorium on implementing that practice is permanent, the federal interest in asserting authority to enforce federal law does not vanish as a result. Therefore, the Court finds the likelihood that the defendants will reinstate the challenged hiring policy is sufficient to escape the Eleventh Amendment bar.

Id. While this is a close question, we decline to vacate the declaratory judgment against the State Defendants on the grounds they advance.

V.

For the reasons discussed above, the decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: November 22, 1996

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable WILLIAM J. BAUER, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

Nos. 96-1055 & 96-1163

GARY VICKERY, on behalf of himself and on behalf of Classes A and B,

Plaintiff-Appellant
Cross-Appellee

v.

JANELL JONES, WILLIAM PEARMAN, also known as WILLIAM PEERMAN, KIRK BROWN, et al.,

Defendants-Appellees
Cross-Appellants

SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and WILLIAM ROBERTS,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Illinois, Benton Division
No. 93 C 4030—James L. Foreman, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

[Dated December 6, 1995]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY VICKERY,	)	
	)	
Plaintiff,	)	No. 93-C-04030
	)	
v.	)	Hon.
	)	James L. Foreman
	)	
JANELL JONES, WILLIAM PEARMAN, KIRK BROWN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,	)	
	)	
Defendants.	)	

FINAL JUDGMENT IN A CIVIL CASE

This action came before the Court on the parties' motions to dismiss, motion for class certification, petition for preliminary injunction, and motion for judgement on the pleadings. After considering all motions and decisions having been duly rendered, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Two classes ("the plaintiff classes") have been certified. Class A consists of "all persons denied the position of full time temporary highway maintainer for periods of six months due to their political affiliation or non-affiliation or the lack of support by the Republican Party." Class B consists of "all persons denied the position of highway maintainer as established under the Illinois Personnel Case, Ill. Rev. Stat., Ch. 127, due to their

political affiliation or non-affiliation or the lack of support by the Republican Party."

2. Judgment is entered in favor of defendants William Roberts and the Saline County Republican Central Committee and against the plaintiff classes on all claims in the Second Amended Complaint.

3. Judgment is entered in favor of the plaintiff classes and against defendants Janell Jones, William Pearman and Kirk Brown on the plaintiff classes' claim for a declaratory judgment in Count I of the Second Amended Complaint as follows: IT IS HEREBY DECLARED THAT "defendants' use of political affiliation as a criterion for hiring temporary highway maintainers is unconstitutional pursuant to *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)." (Memorandum and Order of March 7, 1995.) Judgment is entered in favor of defendants Janell Jones, William Pearman and Kirk Brown and against the plaintiff classes on the plaintiff classes' remaining claims for declaratory relief in Count I of the Second Amended Complaint.

4. Judgment is entered in favor of defendants Janell Jones, William Pearman and Kirk Brown and against the plaintiff classes on the plaintiff classes' claims for injunctive relief in Count I of the Second Amended Complaint.

5. Judgment is entered in favor of defendants Janell Jones, William Pearman and Kirk Brown and against the plaintiff classes on the plaintiff classes' claims for monetary relief in Count I of the Second Amended Complaint.

6. Judgment is entered in favor of defendants Janell Jones, William Pearman and Kirk Brown and against

the plaintiff classes on the plaintiff classes' claims for relief in Count II of the Second Amended Complaint.

Date: 12-6-95

STUART J. O'HARE, CLERK

/s/
By:

APPROVED: /s/
James L. Foreman, Judge

APPENDIX C

[Dated July 6, 1994]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY VICKERY,	)	
	)	
Plaintiff,	)	No. 93-CV-4030-JLF
	)	
v.	)	
	)	
	)	
GENELLE JONES, WILLIAM PEERMAN, WILLIAM ROBERTS, the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and KIRK BROWN,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

FOREMAN, *District Judge:*

This matter is before the Court on the following motions: a motion to dismiss by defendants William Roberts and the Saline County Republican Central Committee (Doc. 22); a motion to dismiss by state officials Genelle Jones, William Peerman,[1] and Kirk Brown (Doc. 27); plaintiff's motion to strike the state officials' supplemental response (Doc. 73); plaintiff's motions to amend the complaint (Docs. 51 and 54); plaintiff's Motion to Certify Actions as Class Action (Doc. 21); and the State

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[1] The Court notes that there is a question as to the correct spelling of the names of Jones and Peerman. The Court will use the spelling contained in the complaint.

Officials' Motion to Dismiss Plaintiff's Class Allegations (Doc. 29).

The plaintiff, Gary Vickery, brought this action against certain state officials and members of the Republican party, alleging that the defendants maintain and operate a political patronage system in which political and financial supporters of the Republican Party of the State of Illinois are favored in regard to state employment as highway maintainers. The plaintiff asks the Court to declare the system illegal and unconstitutional and to enjoin its operation. The plaintiff also seeks compensatory and punitive damages for persons who have suffered injury as a proximate cause of the defendants' conduct. The action was filed pursuant to 42 U.S.C. §§ 1983 and 1988 and, therefore, the Court has jurisdiction under 28 U.S.C. § 1343.

BACKGROUND

In September 1991, Vickery and the Illinois Department of Transportation entered into a contract whereby plaintiff would work under a six-month contract as a highway maintainer. Plaintiff had taken the highway maintainer exam and received an "A" grade. For the next six months he performed his duties in an acceptable manner. However, in April 1992, at the expiration of his contract, Gene Bethel was awarded the six-month contract instead of Vickery. Bethel is now working under a second six-month contract. Plaintiff maintains that he was and is more qualified for the position than Bethel.

Vickery alleges that the defendants acted under color of law in maintaining and operating a political patronage system in Illinois that denied him a second six-month contract. He asserts that state officials Genelle Jones,

William Peerman, and Kirk Brown were motivated by political considerations such as whether the individual was a Republican, was sponsored by an influential Republican, or was a financial or other supporter of the Republican Party. The plaintiff asserts that Jones was employed in the governor's office and told the Illinois Department of Transportation (IDOT) who should be awarded the contracts. Brown was Secretary of IDOT and Peerman worked in IDOT's personnel department.

The complaint alleges that in making these employment decisions, the state officials took advice from defendant Roberts, who was chairman of the Saline County Republican Central Committee, and other Republican Party officials in Illinois. The complaint further alleges that Roberts considered the individual's voting record and support of the Republican Party, and that the Saline County Republican Central Committee and its counterparts in other counties screened employees based on the individual's voting records, support, and potential future support of the Republican Party. As a result, the plaintiff alleges that the state officials favored those persons supported by the Republican Party when approving the six-month contracts for highway maintainer, possibly hundreds of times over the last two years.

The plaintiff claims that his duties as a temporary highway maintainer were the same as the duties for a permanent highway maintainer as established under the Illinois Personnel Code, 20 Ill. Comp. Stat. 415/1 to 415/19c.1 (1993). The plaintiff alleges that there is no provision in the Personnel Code that would allow the duties of a permanent civil service position to be performed under successive six-month contracts. He alleges that the temporary positions are used to avoid hiring

permanent employees. Thus, he contends that the use of the six-month contracts is designed to circumvent the prohibition against political patronage hirings in *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990).

Plaintiff seeks to represent both classes of highway maintainers—i.e., (1) all persons denied the position of highway maintainer for periods of six months due to their political affiliation or non-affiliation or their lack of support by the Republican Party; and (2) all persons denied the permanent position of highway maintainer due to their political affiliation or non-affiliation or their lack of support by the Republican Party.

In Count I of his first amended complaint, the plaintiff contends that he was denied a second six-month contract as highway maintainer because of the defendant's patronage system. This count, which involves only the class of individuals denied the six-month positions, alleges that the denial of this position due to political affiliation or non-affiliation violates the putative class members' rights as protected by the First and Fourteenth Amendments. Count II prays this Court to declare the awarding of the six-month contracts a subversion of the position of permanent highway maintainer and, therefore, involves only the class of persons denied the permanent positions.

DISCUSSION

The state officials and the Republican Party officials have filed separate motions to dismiss the claim against them. The Court also must address the plaintiff's motion to certify the action as a class action, the plaintiff's motion to strike the state officials' supplemental response, and the plaintiff's two motions to amend the complaint.

I. Claims Against the Republican Party Defendants

Defendants Roberts and the Saline County Republican Central Committee move this Court to dismiss Counts I and II pursuant to Rule 12 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. For purposes of the defendants' motion, all well-pleaded allegations of the complaint must be taken as true. *Wolfolk v. Rivera*, 729 F.2d 1114, 1116 (7th Cir. 1984). The test to be applied on a motion to dismiss is whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985).

The plaintiff's civil rights claim is based upon *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), in which the Supreme Court held that state officials cannot make certain employment decisions based upon the employee or job applicant's political affiliation or support. The party defendants acknowledge that under *Rutan*, state officials cannot use political information in connection with employment decisions for public employees. However, the defendants argue that the Court's holding does not prohibit the gathering of information by political organization, such as voting records or financial contributions, or the transfer of the information. The Court agrees.

Nothing in the *Rutan* decision suggests that it is unconstitutional for political parties to disseminate

political information or make recommendations based upon political affiliation or support. In fact the Supreme Court has held that the use of political affiliation information is acceptable for some government positions, policymaking or otherwise. *Branti v. Finkel* 445 U.S. 507 (1980); *see also Elrod v. Burns*, 427 U.S. 347, 372 (1976) (plurality opinion) ("Our decision . . . does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue."). Thus, if political information can properly be considered by state officials in certain circumstances, obviously the political parties may collect and disseminate such information.

Moreover, the party defendants argue that their First Amendment rights would be infringed upon if they were prohibited from engaging in such activities. It is without question that political parties are afforded the protection of the Constitution. *See N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (affirming an association's right "to engage in association for the advancement of beliefs and ideas"). Thus protection includes freedom of speech and association. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *N.A.A.C.P. v. Button*, 371 U.S. 415, 431 (1963) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)).

The First Amendment protects not only the right to speak one's mind on political issues, but also "the right to engage in 'vigorous advocacy'. . . ." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discus-

sion of political policy generally or advocacy or the passage or defeat of legislation." *Id.*

In this case, the political party is advocating that a particular person should be hired, as opposed to elected, for a government position. However, the fact remains that the political party is expressing its views on a governmental matter and, therefore is engaged in political expression. Accordingly the Court concludes that it is not unconstitutional for a political party to compile information, make it available to state officials or advocate that the state hire a particular individual. What *Rutan* prohibits is the *use* of that political information by the state hiring authority.

It is clear that the party defendants did not make the actual employment decisions for the highway maintainer positions. The plaintiff's complaint expressly alleges that IDOT officials Brown and Peerman had the legal authority to approve or disapprove the employment contracts. This same paragraph of the complaint goes on to allege that Peerman and Brown had "cooperated with the patronage system by . . . delegating to Jones, Roberts and the Saline County Republican Central Committee and other officials the decisions for the six-month contracts for highway maintainer." However, it is obvious from reading the complaint as a whole that neither Roberts nor the committee had the power to approve the contract or that they actually hired applicants.

In his brief opposing the motion to dismiss, the plaintiff asserts that "those persons whom the Party Defendants (Roberts and the Committee) names got the jobs." Plaintiff's Response to the Motion to Dismiss at 3. But all this alleges that Roberts and the Committee recommended people for the positions. Plaintiff continually

claims that these defendants "decided" who would fill the position, but it is never alleged that they actually hired applicants. To the contrary, the complaint alleges that the result of the patronage system is that "*Jones, Peerman, and Brown* favored those persons who are supported by the Republican Party when those Defendants approved six-month contracts for the position of highway maintainer." Amended Complaint ¶ 23 (emphasis added). Thus, the plaintiff has not alleged that the state officials "delegated" responsibility to the party defendants in the sense that there was a formal transfer of authority. Rather, the Court construes the complaint to allege only that the state officials in essence "rubber-stamped" the party's recommendations.

Simply making a recommendation as to who should be hired for a particular position does not make out a violation of *Rutan*. Thus, the party defendants cannot be held liable for the constitutional violations alleged under Count I with respect to the persons who were denied temporary highway maintainer positions. Likewise, the plaintiff's failure to allege that the party defendants had actual hiring authority is also fatal to any claim against these defendants in Count II, which seeks a declaration that the awarding of six-month employment contract violates and subverts the provisions of the Illinois Personnel Code.

The Court, therefore, finds that the plaintiff has failed to state a claim for which relief can be granted against the party defendants.[2] Accordingly, the Court hereby

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[2] Defendant Jones has not moved for dismissal on this ground and, therefore, the Court expresses no opinion at this time as to whether this analysis also applies to the claims against her.

GRANTS the motion to dismiss Counts I and II against defendants Roberts and the Saline County Republican Central Committee. The Court notes that this dismissal is WITHOUT PREJUDICE; thus, to the extent that the plaintiff intended to allege that the party defendants had actual hiring authority, the plaintiff may seek leave to amend the complaint accordingly.

In one of his pending motions to amend, the plaintiff seeks leave to add various other Republican Party officials as defendants, such as the Republican Party of the State of Illinois, state party chairman Harold Smith, and other Republican Party county organizations and their officials. The Court notes, however, that the proposed amendment raises essentially the same claims that the Court is dismissing against Roberts and the Saline County Republican Central Committee. Based upon the Court's decision that these allegations do not state a claim that would entitle the plaintiff to relief, the Court hereby DENIES plaintiff's second Motion to Amend the Complaint (Doc. 54).

II. Claims Against the State Officials

The state officials move this Court to dismiss the amended complaint for failure to state a claim on the grounds that *Rutan* does not apply to temporary employees such as plaintiff Vickery. In the alternative, they move to dismiss the damage claims against them under the doctrine of qualified immunity.

A. Motion to Dismiss

The state officials contend that *Rutan's* protection does not extend to temporary employees because the rationale

for the decision makes it clear that the Supreme Court meant to limit its holding to permanent, or career, employees. The defendants also argue that temporary employees are more analogous to independent contractors who, under Seventh Circuit authority, may be hired or fired for political reasons. The Court finds these arguments unpersuasive.

As a preliminary matter, the Court notes that the state officials have filed a supplemental response in support of their motion to dismiss. The plaintiff has filed a motion to strike the supplemental response. Under Rule 15(d) of the Federal Rules of Civil Procedure a party may file supplemental pleadings upon leave of court. Defendants have not made a motion to file the supplemental response. Therefore, the plaintiff's motion to strike (Doc. 73) is GRANTED and the defendants' supplemental response is hereby STRICKEN.

The Supreme Court's political patronage decisions have evolved through three landmark cases decided over a span of fourteen years. The first two cases dealt with the constitutionality of discharging or threatening to discharge employees solely for not supporting the political party in power. *Branti v. Finkel* 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, non-civil service employees of the Cook County sheriff's office brought a class action alleging that they were fired or threatened with dismissal for the sole reason that they were not affiliated with or sponsored by the political party in power. The Court held that the practice of patronage dismissals infringes upon an individual's political beliefs and association, which "constitute the core of those activities protected" by the First and Four-

teenth Amendments. 427 U.S. at 356 (plurality opinion).[3] Therefore, restraints upon these interests are permitted only if such restraints "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* at 363.

In *Branti*, two assistant public defenders employed by the county brought a civil rights action alleging that they were about to be dismissed solely because of political affiliation. The Supreme Court reaffirmed its prior decision that "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs." 445 U.S. at 517. The Court, therefore, held that dismissed employees were not required to prove that they had capitulated to political coercion (e.g., that they had changed their political party or worked for the party's candidates); rather, it was sufficient to prove that they had been discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic party." *Id.* at 516-517.

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[3] The plurality opinion, which was written by Justice Brennan and joined by Justices White and Marshall, found that patronage dismissals would inevitably tend to coerce employees into compromising their true political beliefs. Thus, the practice fell within a line of Supreme Court precedents condemning the use of governmental power to prescribe what the citizenry must accept as orthodox opinion. See *Board of Education v. Barnette*, 319 U.S. 624 (1943). The plurality also relied upon the rule in *Perry v. Sinderman*, 408 U.S. 593 (1972), which prohibits imposing an unconstitutional condition on the receipt of a public benefit. The concurring opinion, which was written by Justice Stewart and joined by Justice Blackmun, cited only to the *Perry* decision. 427 U.S. at 374-375.

Both *Elrod* and *Branti* recognized an exception to thus general rule—i.e., they stated that "party affiliation may be an acceptable requirement for some type of government employment." *Branti*, 445 U.S. at 517. In *Elrod*, the plurality and concurring opinions suggested that patronage dismissals might be appropriate in cases involving policymaking positions. 427 U.S. at 367 (plurality opinion); *id.* at 374-75 (Stewart, J., concurring). The *Branti* decision clarified this exception, stating "the ultimate inquiry is not whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

The *Rutan* decision extended the *Elrod* and *Branti* prohibition to other types of employment decisions. In *Rutan*, the governor of Illinois had issued an executive order that prohibited state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the governor's permission. The plaintiffs brought suit to challenge the governor's use of political considerations in giving his permission for these hiring, transferring, promoting, and rehiring decisions. The Supreme Court held that the *Elrod-Branti* analysis was equally applicable to this type of political patronage. More specifically, the Court rejected the argument that these types of decisions were not punitive in nature and, therefore, do not chill the exercise of protected belief and association by public employees.

With respect to transfers, promotions and recalls, the Court stated:

> Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to vital government interests, we must conclude that they impermissibly encroach on First Amendment freedom.

110 S. Ct. at 2736. The Court further stated that patronage hirings place similar burdens on First Amendment rights by denying access to a state job in the first place.

Today, this Court decides a question that was not expressly addressed in the *Elrod-Branti-Rutan* trilogy—i.e., whether the political patronage rules apply to temporary as well as permanent employees. Based upon the Supreme Court's analysis in the prior cases, the question must be answered in the affirmative.

First, and foremost, the Court notes that the Supreme Court has repeatedly rejected the argument that there is no right or entitlement to public employment and, therefore, political patronage does not infringe upon the employees' First Amendment rights. "[E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Id.* at 360-61 (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). Thus, the Court has long recognized that the government "may not deny a benefit to a person on a basis that in-

fringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry*, 408 U.S. at 597.

Under this analysis, an applicant for a temporary position is indistinguishable from an applicant for a permanent position. Both are seeking a state paycheck and other benefits, if any, that may be provided by the state. The temporary nature of the job may affect the size and number of benefits provided to the successful applicant and the length of time in which that are available. However, that does not detract from the fact that the applicant is being denied a state job for however long it may last and for whatever remuneration is available. In fact, the plaintiff in *Perry* could be considered a temporary employee because he was employed under a one-year contract and had filed suit because of his employer's refusal to renew the contract for another year. 408 U.S. at 594. Thus, the Court concludes that the rule set forth in *Perry* and adopted for patronage cases in *Elrod, Branti* and *Rutan* was intended to apply to temporary employees.

Secondly, although the Supreme Court did not expressly state that its decisions applied to temporary employees as well as permanent employees, the Court's rationale for the *Elrod-Branti-Rutan* prohibition has equal force in both settings. "Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 110 S. Ct. at 2739. Applicants for temporary positions have the same First Amendment rights to their personal political beliefs and associations as do applicants for permanent positions. Accordingly,

regardless of whether a particular job is temporary or permanent the government must demonstrate (1) a vital government interest that would be furthered by its political hiring practices; and (2) that the patronage practices are narrowly tailored to achieve that governmental interest.

The Supreme Court has discussed several proposed governmental interests in the *Elrod-Branti-Rutan* trilogy. However, the Court's decision have made no distinction between temporary and permanent employees, and the defendants have not presented any principled reason for recognizing such a distinction. For example, the Court recognized that the government has an interest in securing effective employees. *Rutan*, 110 S. Ct. at 2737. But the Court held that this interest can be met by discharging, demoting, or transferring employees whose work is deficient. *Id.* Similarly, the "government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Id.* This analysis is equally applicable to employees hired on a temporary basis as well as on a permanent basis.

The Supreme Court also recognized that the government has an interest in preserving the democratic process. However, the Court stated that political patronage is not the least restrictive means of achieving this end. *Id.; Elrod*, 427 U.S. at 369-69. Again, this analysis does not change when applied to temporary positions as opposed to permanent jobs.

The Court recognized that some types of jobs may be subject to political patronage. However, in order to qual-

ify for this exception, the hiring authority must demonstrate "that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. The defendants have not done so in the case at bar. To the contrary, the plaintiffs assert that the State of Illinois itself has classified the job of permanent highway maintainer as a position that does not qualify for this exception. This Court can find no vital governmental interest in requiring *temporary* workers to be affiliated with the party in power when the government acknowledges that it does not have such a vital interest with respect to employees hired for the same position on a *permanent* basis.

The Court further notes that several First Circuit decisions that pre-dated *Rutan* found "no practical difference" between permanent and career employees for First Amendment purposes. *See, e.g., Cheveras Pacheco v. Rivera Gonzalez,* 809 F.2d 125, 127-28 (1st Cir. 1987). That court stated that *Elrod* and *Branti* clearly apply to an employee's rights to retain his public employment and that there is no difference between employees discharged from permanent employment and those who fail to receive a new appointment. *Id.*[4] "Any other result would seriously undermine *Elrod* and *Branti* because local governments could pass laws providing that jobs of non-

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[4] This holding was advanced by *Figueroa v. Aponte-Roque*, 864 F.2d 947 (1st Cir. 1989). The court stated that transitory employees are protected from politically motivated non-renewals regardless of how many terms the transitory employee had served. "Although a long-tenured 'temporary' employee 'particularly' enjoys the protection described in *Elrod* and *Branti* a one-term employee also is protected from political discharge." *Id.* at 951 n. 7.

policymaking employees extend only from election to election, and that the new officeholder is entitled to make all new appointments." *Id.* at 128. That is exactly what the plaintiff has accused the defendants of doing in the case at bar.

Additionally, the Court notes that the First Circuit has extended the *Elrod-Branti* rule to persons employed under contract. The court in *Cordero v. De Jesus-Mendez,* 867 F.2d 121 (1st Cir. 1989), stated that "contract employees [may not] be discharged in violation of their first amendment right to free political speech and association." The court reiterated that the lack of an expectation of continued employment does not justify dismissal based on private political beliefs. *Id.*

The defendants also assert that temporary employees are analogous to independent contractors who may be hired or fired for political reasons.[5] The Seventh Circuit has declined to extend the *Elrod-Branti* decisions to independent contractors. *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983). In *Triad Associates, Inc. v. Chicago Housing Authority,* 892 F.2d 583, 587 (7th Cir. 1989), the court refused to reconsider *LaFalce* and reaffirmed that the *Elrod-Branti* prohibition against discharge of public employees for partisan reasons does not apply to inde-

---

[5] The Court notes that there is no dispute over the fact that the positions at issue in this case are filled by temporary employees and not independent contractors. The state defendants assert that the nature and scope of temporary employment "distinguishes temporary employees like plaintiff" from permanent employees. State Official's Response to Plaintiff's Motion to cite Additional Authority at 2. Thus they concede that the work at issue here does not involve independent contractors.

pendent contractors. More recently, the Seventh Circuit again declined to overturn *LaFalce* and reiterated that "political favoritism in the awarding of public contracts is not actionable." *Downtown Auto Parks, Inc. v. City of Milwaukee,* 9338 F.2d 705, 710 (7th Cir.), *cert. denied,* 112 S. Ct. 640 (1991).

Thus, it is undisputed that independent contractors may be hired or fired for political reasons. The issue is whether temporary employees are analogous to independent contractors so that they too may be hired or fired for political reasons. The Court finds they are not analogous.

The *LaFalce* court noted that the basis of the *Elrod-Branti* prohibition against patronage "is that public employees would be discouraged from expressing their true political views if it might cost them their jobs." 712 F.2d at 293. Rejecting the argument that independent contractors will be similarly discouraged, the court stated:

> If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent . . . it is not the end of the world him; there are other government entities to bid to, and private ones as well. It is not like losing your job.

Id. at 294. When an independent contractor loses a contract, the contractor presumably still has other business. Each contract generally represents only a portion of the contractor's work and the loss of one contract does not put the contractor out of work entirely. However, a temporary job is usually an individual's sole source of employment. Just as the loss of a permanent job puts the permanent employee out of work entirely, the loss of a

temporary job also puts the temporary employee out of work entirely.

Although the *LaFalce* court stated that unless the government worker cannot find another job the "loss will not be a total catastrophe", it did recognize that government jobs are generally more lucrative than private sector jobs. *Id.* The court stated:

> [M]any government workers could not find employment at the same wage in the private sector; and the prospect that a protracted period of search following discharge might well result in a substantially less well paid job would cause many government workers to flinch from taking political stands adverse to their superiors. An independent contractor would tend we imagine to feel a somewhat sense of dependency.

Id. Government jobs are especially lucrative in areas facing widespread unemployment. One such area is southern Illinois, where it is difficult to find any jobs in the private sector much less jobs with good salaries. Government contracts, on the other hand, generally are not more lucrative than private sector contracts. An independent contractor who engages in the competitive bidding process is not expected to charge a higher price to the government than it would to a private entity. Any independent contractor who did bid a higher price to the government would be awarded few public contracts.

In addition, many government workers cannot look to the private sector for similar employment. Independent contractors are generally not limited to the public sector since most independent contractors can compete for both public and private sector contracts. However, for a temporary highway maintainer like the plaintiff, there is no

equivalent to his job in the private sector. The *Rutan* Court recognized this in outlining the importance of a state job. "There are . . . occupations for which the government is a major (or the only) source of employment. . . . Thus, denial of a state job is a serious privation." 110 S. Ct. at 2738.

Independent contractors are also not analogous to temporary employees in their political affiliation. As the *Downtown* court noted, independent contracting firms that have extensive government business are often "political hermaphrodites" that protect themselves by having connections to both major political parties. 938 F.2d at 709 (citing *LaFalce*, 712 F.2d at 294). Temporary employees do not have this luxury because as individuals they can generally affiliate themselves with only one political party at a time. Additionally, a number of independent contractors are corporations that do not vote and, therefore do not have to declare a particular political affiliation at election time.

It is important to note that the *LaFalce* decision relied upon a cost-benefit analysis—i.e., "Judge Posner weighed the costs of further subjecting this country's long-established patronage system to first amendment scrutiny against the benefits to a contractor's exercise of first amendment rights and concluded that, in the case of contractors, the costs outweighed the benefits." *Triad*, 892 F.2d at 587. This analysis is based, at least in part, upon the fact that the sheer volume of government contracts is considerable larger that the number of government jobs. "[A] rule upholding a company's First Amendment right to have its bid considered without regard to politics would 'invite every disappointed bidder for a public contract to bring a federal suit against the

government purchaser." *Downtown*, 938 F.2d at 709. The court expressed "a concern about flooding the federal courts with new First Amendment claims." *Id.* While acknowledging that *Rutan* marked an expansion of such First Amendment claims, the court relied heavily on the fact that *Rutan's* precedential effect is limited to "the context of governmental employment." *Id.* "Thus, to the extent that protection granted to public employees under the *Elrod-Branti* line of cases may be extended to contractors, we leave that extension to the Supreme Court." *Triad*, 892 F.2d at 588. Affording First Amendment protection to temporary employees would not be an extension of rights because the right to protection as a public employee already exists.

One final difference between a temporary employee and an independent contractor is the level of control the employer has over the method in which the work is done. Generally an independent contractor is subject to the employer's control only as to the final result of the work. However, the employee is subject to his employer's desires as to both the end product and the means by which it is to be accomplished. In the case at bar, the plaintiff alleged his employment duties "were the same as the duties of the full time, civil service highway maintainer position. . . ." Amended Complaint ¶ 12. Even though their length of service is determined by contract, temporary employees are subject to their employer's control and direction over the details of their work in the same way that permanent employees are subject to their employer's control and direction. Independent contractors are not subject to these restrictions.

In fact, because independent contractors do not have supervisors who monitor their work, they are more like

the high-ranking supervisors/decisionmakers the *Rutan* Court allowed to be selected or dismissed based on political affiliation. "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Rutan*, 110 S. Ct at 2737. Thus, like high-level employees, independent contractors do not have supervisors and can be hired or dismissed on the basis of political affiliation to ensure that their work is done in accordance with the party's philosophies.

For these reasons, the Court concludes that the Supreme Court's decision in *Rutan* must encompass both temporary and permanent employees. Temporary employees are not analogous to independent contractors who may be hired or fired on political grounds. Absent a vital governmental interest, *all* hiring, promotion, transfer, recall, and dismissal decisions conditioned on political belief and association are unconstitutional regardless of the length of time the individual will serve. The defendants have identified no such governmental interest here. Therefore, the Court DENIES the state official's motion to dismiss to the extent that it seeks dismissal of Count I for failure to state a claim.

B. Qualified Immunity

The state officials assert that this Court should dismiss plaintiff's claim for compensatory and punitive damages on qualified immunity grounds because the plaintiff cannot establish the existence of a clearly established right. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil dam-

ages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether qualified immunity applies, an objective standard is applied. *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, a qualified immunity analysis involves a purely objective inquiry to determine whether, at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented. *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989); *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989).

It is significant to note that the plaintiff is asking for damages only in Count 1 of the complaint, which is based on the use of political patronage in hiring temporary employees as highway maintainers.[6] Vickery alleges that the defendants violated his constitutional rights by refusing to renew his six-month contract. Therefore, the question is whether the law was "clearly established" that *Rutan* applied to temporary employees. *See Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987) ("[T]he test for immunity should be whether the law was clear in

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[6] Count II seeks joint injunctive and declaratory relief. Therefore, the qualified immunity analysis only applies to Count I.

relation to the specific facts confronting the public official when he acted.").

The plaintiff asserts that *Rutan* clearly applied to temporary employees at the time that it was decided because one of the plaintiffs in *Rutan*, Ricky Standefer, was a temporary employee. But it is far from clear that the Supreme Court made its decision on that basis. in fact, there is no indication whatsoever that Standefer's status as a temporary employee was raised or argued as an issue. Rather, the Supreme Court's analysis turns only upon his status as a "a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party." 110 S. Ct. at 2733.

The Supreme Court construed the *Rutan* complaint as alleging that Standefer and a co-plaintiff, Dan O'Brien, "were not recalled after layoffs because they lacked Republican credentials." *Id.* Their claims are listed in the complaint under the subheading of "Plaintiffs Who Have Been Laid Off By The State Of Illinois and Not Rehired." Rutan Complaint, at 6. The complaint then alleges that "[p]laintiffs, Dan O'Brien and Ricky Standefer, are residents, taxpayers and voters of the State of Illinois and are members of and appropriate representatives of a class of persons who have been laid off from employment in departments, boards or commissions under the jurisdiction of the Governor and who have been and are prevented or impaired from being recalled to work or prevented or impaired from an equal opportunity to obtain employment with the State of Illinois because they are not deemed politically acceptable or approved by Defendants." Rutan Complaint ¶ 9a.

The complaint does briefly mention Standefer had been "hired in a temporary position" at the state garage. *Id* ¶ 21a. This same fact also was mentioned in the district court's opinion, the Seventh Circuit's opinion, and the state's brief filed in the Supreme Court. However, the mere fact that this status was mentioned is not dispositive of the issue. What is critical is whether the parties *argued* that his status as a temporary employee would affect his claim or whether the Supreme Court expressed any opinion as to whether such status might be relevant. There is no indication that Standefer's status as a temporary employee was raised as an issue. Nor is there anything in *Rutan* to suggest that the Supreme Court took this status into consideration. Instead, the Court's opinion focused only on Standefer's classification as a person who was not recalled after layoff.

Under these circumstances, it was not clear from *Rutan* itself that the decision covered temporary employees. In fact, at the time of the alleged violation in this case, other circuits had suggested that *Rutan* may be limited to career employees only. *Roque-Rodriguez v. Lema Moya*, 926 F.2d 103, 107 (1st Cir. 1991). Accordingly, the Court finds that at the time of the alleged violation, it was not "clearly established" that *Rutan* applied to temporary employees. Therefore, the Court hereby GRANTS the state officials' motion to dismiss based upon qualified immunity.

Qualified immunity shields defendants in their individual capacities only. *Knox v. McGinnis* 998 F.2d 1405, 1412 (7th Cir. 1993); *Hadi v. Horn*, 830 F.2d 779, 782 (7th Cir. 1987). Therefore, the action for damages against the state officials in their official capacities is DISMISSED. The plaintiff's request for declaratory and

injunctive relief against these parties in their individual capacities will proceed.

The Court further notes that two of the state officials, Peerman and Brown, are also sued in their official capacities. However, a suit against a state official in his official capacity is a suit against the state for Eleventh Amendment purposes. *Papasan v. Allain*, 478 U.S. 265 (1986); *Kentucky v. Graham*, 473 U.S. 159 (1985). Although the defendants have not raised the Eleventh Amendment as a defense, the amendment is a jurisdictional bar and must be raised by the Court *sua sponte*. *Mathes v. Nugent*, 411 F.Supp. 968 (N.D. Ill. 1976). Absent a waiver by the state or a congressional override, such suits are barred by the Eleventh Amendment to the extent that they seek to recover monetary damages. *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904, 907-08 (7th Cir. 1991). Since there is no evidence of such consent or congressional override applicable to this case, the Eleventh Amendment bars suit against these defendants for monetary damages. Therefore, the action for damages against Peerman and Brown on their official capacities also must be DISMISSED.

The Eleventh Amendment does not bar official capacity actions to the extent that they request prospective relief—i.e., an injunction. *Ex Parte Young*, 209 U.S. 123 (1908). "An action for prospective injunctive relief against a state official is brought properly in the official's *official* capacity." *Akins v. Board of Gov. of State Colleges & Univ.* 840 F.2d 1371, 1377 (7th Cir.) (emphasis in original), *vacated on other grounds*, 488 U.S. 920 (1988); *Scott v. Lacy*, 811 F.2d 1153, 1153-54 (7th Cir. 1987). Therefore, the claims for injunctive relief in Counts I and

II shall also proceed against Peerman and Brown in their official capacities.

III. Certification as a Class Action

Plaintiff claims he is a member and appropriate representative of two classes of persons. First, under Count I, he seeks to represent all persons denied the position of full-time temporary highway maintainer for periods of six months due to their political affiliation or non-affiliation or their lack of support by the Republican Party. Second, under Count II, he seeks to represent all persons denied the position of permanent highway maintainer, as established under the Illinois Personnel Code, due to their political affiliation or non-affiliation or their lack of support by the Republican Party. The state officials allege the class allegations must be dismissed as matter of law for failure to satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

As a preliminary matter, the Court notes that the plaintiff has filed a motion to amend the complaint to more correctly describe the two highway maintainer positions at issue. The defendants have not objected to this motion and the Court finds that the amendment would make the pleadings easier to understand. Therefore, the Court GRANTS this Motion to Amend the Complaint (Doc. 51).

A. Class Certification Under Rule 23.

Rule 23(a) provides that representatives may sue on behalf of a class if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition, the court must find that: (1) the prosecution of separate actions by individual class members would create inconsistent adjudications or impair the ability of other class member to protect their interests; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to members of the class predominate over questions affecting individual members so that a class action is superior to other methods of adjudication the controversy. *Id.* Rule 23(b). The party seeking class certification bears the burden of showing that certification is proper. *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984). Failure to meet any one of the requirements of Rule 23 precludes certification of a class. *Patterson v. General Motors Corp.*, 631 F.2d 476, 480 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981).

1. Numerosity

Determining a proposed class is so numerous that joinder of all members is impracticable does not mean that a complaint must allege the exact number or identity of all class members. *Patrykus v. Gomilla*, 121 F.R.D. 357, 360 (N.D. Ill. 1988) (citing 1 H. Newberg, Newberg on Class Actions § 3.05 (2d ed. 1985)). This

Court is entitled to make common sense assumptions to support a finding of numerosity. *Grossman v. Waste Mgt., Inc.*, 100 F.R.D. 781, 785 (N.D. Ill. 1984).

Plaintiff alleges that since *Rutan* was decided, more than 2,000 persons have become eligible for the position of full-time temporary or permanent highway maintainer. Plaintiff's Brief in Support of Class Action at 3-5. Based on this fact, Vickery asserts that there are at least 2,000 members of each class, which satisfies the numerosity requirement. Defendants do not challenge this assertion, and the Court agrees that a class size numbering in the thousands meets the numerosity requirement. *See Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 407 (N.D. Ill. 1987) (numerosity satisfied for class estimated at more than a thousand potential members). Therefore, the numerosity requirement of Rule 23(a) is met.

2. Commonality and Typicality

Courts have recognized that the commonality and typicality requirements tend to merge. *De La Fuente v. Stokely-Van Camp, Inc.* (7th Cir. 1983). "Both serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected . . . ." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

"Where a question of law refers to a standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement . . . is usually met." *Franklin v. City of Chicago*, 102 F.R.D. 944, 949 (N.D. Ill. 1984). "A Plaintiff's claim is typical if

it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Resnick v. American Dental Ass'n,* 90 F.R.D. 530, 539 (N.D. Ill. 1981) (citing Newberg, Class Actions §1115(b) at 185 (1977)).

The state officials assert this Court should dismiss the class action allegations based on the Fourth Circuit's holding in *Stott v. Haworth,* 916 F.2d 134 (4th Cir. 1990), which questioned the appropriateness of class treatment of political patronage cases. In *Stott*, the plaintiffs, who "held an array of jobs", sought class certification to show a pattern or practice of patronage dismissals. The court found that the plaintiffs did not satisfy commonality and typicality because "[t]he only question common to each member of the class is whether or not his or her position was one that was subject to patronage dismissal." 916 F.2d at 145. The court found this required a "position by position" analysis of the constitutional claims raised. *Id.*

The case at bar is distinguishable because it is clear that each putative class member sought or held the position of highway maintainer. It is also clear, as discussed above, that the position of highway maintainer is subject to the *Elrod-Branti-Rutan* prohibition on political patronage. The Court further notes that the plaintiff's remaining claims are limited to injunctive and declaratory relief, which eliminates the need to determine individual monetary awards for each plaintiff. Therefore, the individualized determinations called for by *Stott* are unnecessary for the putative class.

The *Stott* court went on to say the "[c]lass certification is only proper when a determinative critical issue overshadows all other issues." *Id.* In the case at bar, the issue of whether the alleged practice or course of conduct—i.e., the patronage system—violated the constitutional rights of the putative class members overshadows all other issues.

The state officials also argue that class certification is improper because each class member will have to demonstrate the "but for" party affiliation or support, he would have been hired. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (where constitutionally protected conduct was motivating factor in decision not to rehire teacher who has been involved in several "incidents", inquiry should have addresses whether same decision would have been reached in absence of protected conduct). But the putative class members in this case are not in the same situations the litigants in *Stott* and *Mt. Healthy*. The putative classes in this case consist of individuals who possess the basic qualifications for the job, but are not considered because of their political affiliation. In addition the claims upon which the class action would proceed are not only for injunctive and declaratory relief. The claims only seek a prohibitive and equitable remedy to prevent the conduct from occurring again. Thus, the classes Vickery wishes to represent are specifically tailored to those individuals who would have been considered for employment "but for" their political affiliation or support. No individualized determination is necessary; there is no need to make an individual "but for" determination for a class composed solely of "but fors."

The Seventh Circuit has held that commonality was satisfied when the putative plaintiffs alleged they were subjected to "an institutionalized course and pattern of unconstitutional conduct" by various government agencies and employees. *Alliance to End Repression v. Rochford*, 565 F.2d 975 (7th Cir. 1977). Likewise, the Seventh Circuit upheld the trial court's finding that typicality had been satisfied when "[t]he major claims of the plaintiffs . . . are directed at the recruiting and disclosure practices" of the defendants where "[a]ll members of the class were subject to the same allegedly unlawful practices." *De La Fuente*, 713 F.2d at 232-33. Plaintiff claims the alleged patronage system adversely affected all the class members because they did not have Republican Party support. Since a common question of law referring to the standardized conduct of defendants predominated and individualized determinations are not necessary, plaintiff Vickery has satisfied the commonality and typicality requirements of Rule 23(a).

3. Fair and Adequate Representation

Defendants assert that Vickery is an inadequate class representative because he is a political and financial supporter of the Republican Party and because he initially received the job in question as a result of Republican support. They claim that by being a Republican, plaintiff cannot fairly and adequately represent the class because there may be unique defenses to his claim that do not apply to the putative classes.

Plaintiff is not alleging that the class is composed of only non-supporters of the Republican Party, but that it is composed of individuals denied the position of highway

maintainer "due to their political affiliation or non-affiliation or their lack of support by the Republican Party." Amended Complaint ¶ 4. Thus, the inquiry is not only whether the proposed class members supported the Republican Party, but also whether the Republican Party supported the proposed class members. A putative class member may be affiliated with the Republican Party, but he might not carry its support. For example, an individual may be affiliated with the Republican Party and vote in Republican elections but choose not to contribute money or time to support any particular candidate. Denying this person an employment opportunity solely because of his support for the party's candidate has virtually the same coercive effect on his freedom to believe and associate—or not to believe and associate—as it would have on an individual who has not affiliated with the party at all.

Therefore, it does not matter that the plaintiff admits that he is Republican and that he initially obtained the temporary position by political sponsorship. The important fact is that he has alleged that he lost the support of the Republican Party and, allegedly the possibility of renewal of his contract when his political sponsor no longer had political clout. That is sufficient to bring his claim within the class of plaintiffs recognized in *Elrod*, *Branti* and *Rutan*—i.e., plaintiffs who can prove that they suffered an adverse employment decision "solely because they were not affiliated with or supported by" the Republican Party. *Branti*, 445 U.S. at 517.

Plaintiffs who obtain employment by political patronage are not prevented from challenging their employment termination when their sponsors lose political clout. In fact, in *Elrod*, the plaintiffs challenged by class

action the termination of their employment because they were not affiliated with or sponsored by a particular political party. The plaintiffs had obtained the very jobs they were clinging to by virtue of their political affiliations. 427 U.S. at 377 (Powell, J., dissenting).

The Court finds that the plaintiff Vickery is a typical representative of the class because he does not have the sponsorship of the Republican Party for the highway maintainer position. In addition, plaintiff's attorneys, Leahy Law Offices, will adequately represent the class. Leahy Law Offices represented the plaintiff class in *Rutan* from 1985 through settlement in 1992. The Court, therefore, concludes that the plaintiff has met the requirements of numerosity, commonality, typicality and adequacy of representation contained in Rule 23(a).

4. Additional Requirements of Rule 23(b).

In addition to satisfying Rule 23(a), a class action must satisfy at least one element of Rule 23(b). Plaintiff does not specify which section of Rule 23(b) his claim falls under. However, the Court finds that the action would be proper under Rule 23(b)(2) because the defendants acted on allegedly unconstitutional grounds generally applicable to all class members and the complaint seeks declaratory and injunctive relief. Rule 23(b)(3) also is applicable because common questions of law concerning the constitutionality of defendants' behavior clearly predominate, making a class action the superior method to adjudicate the controversy.

Based on this analysis, the Court finds that plaintiff Vickery has satisfied the requirements of Rule 23(a) and (b). Accordingly, the Court hereby GRANTS plaintiff's

Motion to Certify Action as Class Action (Doc. 21) and DENIES the State Official's Motion to Dismiss Plaintiff's Class Allegations (Doc. 29).[7]

CONCLUSION

The motion to dismiss filed by defendants Roberts and the Saline County Republican Central Committee is GRANTED (Doc. 22). The plaintiff's Motion to Strike is GRANTED (Doc. 73). The State Official's Motion to Dismiss the Amended Complaint (Doc. 27) is GRANTED IN PART AND DENIED IN PART.

Accordingly, the Court DISMISSES WITHOUT PREJUDICE the claims against Roberts and the Saline County Republican Central Committee in their entirety and DISMISSES the monetary damages claims against the state officials in Count I. The claims for declaratory and injunctive relief in Counts I and II will proceed against the state officials in both their individual and official capacities.

The plaintiff's first Motion to Amend the Complaint is GRANTED (Doc. 51), but the second motion to amend is DENIED (Doc. 54). The Plaintiff's Motion to Certify Action as Class Action is GRANTED (Doc. 21) and the state officials' Motion to Dismiss Plaintiff's Class Allegations id DENIED (Doc. 29).

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[7] It is important to note that this decision is based upon the fact that the plaintiff's remaining claims are only injunctive and declaratory reliefs. Thus the Court may reconsider the class certification issue if, for whatever ever reason, the plaintiff's claims for monetary damages are reinstated in the future.

The Court further INSTRUCTS the parties to file suggestions on how this matter shall proceed based on the above rulings—e.g., to suggest whether further discovery is required or whether the remaining issues can be decided on a motion without further discovery. These suggestions shall be filed on or before August 5, 1994.

IT IS SO ORDERED.

DATED: July 6, 1994

/s/
DISTRICT JUDGE

APPENDIX D

[Filed Nunc Pro Tunc July 6, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

GARY VICKERY,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 93CVO4030-JLF
	)	
	)	
GENELLE JONES, WILLIAM PEERMAN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

Now comes the Plaintiff, GARY VICKERY, by his attorneys, Leahy Law Offices, and for his cause of action against Defendants, GENELLE JONES, WILLIAM PEERMAN, WILLIAM ROBERTS, the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE, Illinois, and KIRK BROWN respectfully represents unto the Court as follows:

Introductory Statement

1. This is a class action by Plaintiff against Defendants, who are officials and employees of the State of Illinois, and Defendants, who are persons acting in con-

cert with Defendant officials and employees, asking this Court to declare illegal and unconstitutional Defendants maintaining and operating a political patronage system by which political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment as highway maintainers and which system discriminates against those who are not such political and financial supporters in regard to State of Illinois employment as highway maintainers. This action also asks that the Defendants be enjoined from operating and maintaining the political patronage system.

2. This action also seeks compensatory and punitive damages for persons who have been, continue and will continue to suffer injury as a proximate result of Defendants' conduct.

Count I

(Civil Rights Claim)

Jurisdiction

3. This cause arises under 42 *United States Code* 1983, 1988 and jurisdiction of this Court arises under 28 *United States Code* 1343.

Plaintiff

4. Plaintiff, GARY VICKERY, is an adult, male resident of Saline County, State of Illinois.

5. Plaintiff is a member of and an appropriate representative of the following classes of persons:

a. all persons denied the position of full time temporary highway maintainer for periods

of six months due to their political affiliation or non-affiliation or their lack of support by the Republican Party;

b. all persons denied the position of permanent highway maintainer as established under the Illinois Personnel Code, *Ill. Rev. Stat.*, Ch. 127, due to their political affiliation or non-affiliation or their lack of support by the Republican Party.

Defendants

6. Defendant, GENELLE JONES, is an adult, female resident of Sangamon County, State of Illinois, and at times relevant hereto was employed in the Governor's Office of the State of Illinois; in that position she told the Department of Transportation of the State of Illinois (hereinafter referred to as IDOT) who should be awarded six-month contracts to work as highway maintainers for IDOT. Defendant JONES is sued in her individual capacity.

7. Defendant WILLIAM PEERMAN is an adult, male resident of Sangamon County, State of Illinois, and at times relevant hereto worked in the personnel department of IDOT in Illinois. Defendant PEERMAN is sued in his official and individual capacities.

8. Defendant, WILLIAM ROBERTS is an adult, male resident of Saline County, State of Illinois; at all times relevant hereto he was the Chairman of the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE; he is being sued in his individual capacity and as head of the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE.

9. Defendant SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE, is a political, not-for-profit association located in Saline County, State of Illinois.

10. Defendant KIRK BROWN is an adult, male resident of Sangamon County, State of Illinois, and at all times relevant hereto was Secretary of the Illinois Department of Transportation; he is being sued in his individual and official capacities.

Employment History

11. In September, 1991, Plaintiff and IDOT entered into a written contract whereby Plaintiff would work as a highway maintainer for IDOT from September 30, 1991, to March 31, 1992, at the IDOT shed in Harrisburg, Illinois; Plaintiff was not given a copy of that contract.

12. His duties in that position were the same as the duties of the full time, civil service highway maintainer position which has been established under the Personnel Code of the State of Illinois. *Ill. Rev. Stat.*, Ch. 127.

13. Plaintiff had taken the examination for the position of highway maintainer as established by that Personnel Code and had received an "A" on the examination.

14. Pursuant to the contract, Plaintiff worked as a highway maintainer from September 30, 1991, to March 31, 1992, and performed his duties in an acceptable manner.

15. In April, 1992, a man by the name of Gene Bethel was awarded a six-month contract to work as a highway maintainer.

16. The availability of the six-month highway maintainer position that Gene Bethal was given was not advertised or posted in any way.

17. Gene Bethel is now working as a highway maintainer for a second six-month period.

18. Plaintiff was, and is, more qualified for the position of highway maintainer than is Bethel.

19. Plaintiff believes no full time highway maintainers have been hired for the highway maintainer position established under the Personnel Code since the decision in *Rutan v. Republican Party*, ___ U.S. ___ 110 S.Ct. 2729 (1990) came down from the United States Supreme Court in June, 1990.

Statement of Plaintiff's Claim

20. Gene Bethel's affiliation with the Republican Party and the support of and the sponsorship by that Party resulted in Bethel working as a highway maintainer and resulted in the denial of that position to Plaintiff.

21. The use of a six-month contract to fill the position of highway maintainer rather than filling that position under the Personnel Code is designed to circumvent the United States Supreme Court ruling in *Rutan v. Republican Party*, ___ U.S. ___, 110 S.Ct. 2729 (1990).

The Patronage System

22. At all times relevant hereto, Defendants maintained and operated a political employment patronage system in the State of Illinois, which operated under the following circumstances and in the following manner:

a. In making decisions regarding employment, Defendants JONES, PEERMAN and BROWN were substantially motivated by political considerations. Such political considerations included whether the individual under consideration was a Republican, was sponsored by an influential Republican, was a financial supporter of the Republican Party or an influential Republican, or was a supporter of the incumbent Republican administration;

b. In making decisions regarding employment, Defendants JONES, PEERMAN and BROWN took advice from Defendant ROBERTS and other Republican Party officials in counties throughout the State who considered the following:

1) the individual's voting records and the voting records of the individual's relatives;

2) support by the individual and his relatives for the Republican Party and its candidates;

3) the individual's and his family's financial and other support of the Republican Party and its candidates;

4) the approval of the Republican Party officials at the county level.

c. The Defendant SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and other Republican Party County Organizations under the direction of Defendant ROBERTS and other party officials screened employees by determining:

1) the voting history of the person and the voting history of that person's relatives;

2) the person's and his family's past financial support of the Republican Party and its candidates;

3) the future potential of such financial support;

4) the potential of future "volunteer" work by the applicant on behalf of the Republican Party and its candidates;

5) the sponsorship of the person by influential Republicans.

d. Defendant PEERMAN and BROWN had legal authority in approving or disapproving proposed employment contracts. They cooperated with the patronage system by active participation in or by delegating to Defendants JONES, ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE and other officials of the Republican Party in counties throughout the State the decisions regarding six-month contracts for the position of highway maintainer.

23. The result of this patronage system is that Defendants JONES, PEERMAN and BROWN favored those persons who are supported by the Republican Party when those Defendants approved six-month contracts for the position of highway maintainer.

24. Upon information and belief, Plaintiff states that hundreds of such six-month contracts have been awarded to the politically favored in the last two years.

Effect of the Patronage System

25. In direct retaliation for not having the support of the Republican party, its candidates or the incumbent Republican Administration, Defendants, JONES, PEERMAN, BROWN, and ROBERTS, with the direction of Defendant SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE denied Plaintiff the position of highway maintainer.

26. At all times relevant hereto, Plaintiff was entitled to exercise his rights protected by the First Amendment as applied to the States by the Fourteenth Amendment to the United States Constitution.

27. Beginning in June of 1990, the State of Illinois conducted audits of all positions under the jurisdiction of the Governor to determine whether political affiliation is an appropriate requisite for each position.

28. Those audits resulted in a finding that political affiliation is not an appropriate requisite for the position of highway maintainer.

29. The denial of the position of highway maintainer to Plaintiff due to his political affiliation or non-affiliation or lack of support by the Republican Party violates Plaintiff's rights as protected by the First Amendment as applied to the States by the Fourteenth Amendment to the United States Constitution and those rights of the members of classes he represents.

30. The use of the six-month contract rather than filling the full time, civil service position of highway maintainer as established under the Personnel Code denies to Plaintiff and to the member of the classes he represents First Amendment rights as applied to the

States by the Fourteenth Amendment to the United States Constitution.

31. Defendants acted under color of law.

32. As a result of the denial of the position of highway maintainer to Plaintiff and to the members of the classes he represents, Plaintiff and the members of the classes he represents have suffered loss of wages, stress, tension, humiliation, injury to reputation and the inability to pursue a chosen career, wherefore, Plaintiff and each member of the class he represents is entitled to damages in the amount of $250,000.00 each.

33. The denial of the position of highway maintainer to Plaintiff and the members of the classes he represents was done in knowing violation of Plaintiff's rights as protected by the First and Fourteenth Amendments to the United States Constitution or in reckless disregard of said rights, and in a deliberate violation or reckless disregard of the United State Supreme Court's ruling in *Rutan v. Republican Party*, ___ U.S. ___, 110 S.Ct. 2729 (1990) wherefore, Plaintiff and each member of the classes he represents is entitled to punitive damages in the amount of $1,000,000.00 each.

WHEREFORE, Plaintiff, GARY VICKERY, prays:

1. This Court certify this litigation as a class action composed of two classes: a) all persons denied the position of highway maintainer for periods of six months due to their political affiliation or non-affiliation or the lack of support by the Republican Party; b) all persons denied the position of highway maintainer as established under the Illinois Personnel Code, *Ill. Rev. Stat.*, Ch. 127, due to their political affiliation or non-affiliation or the lack of support by the Republican Party.

2. This Court enjoin Defendants from appointing persons as highway maintainers based upon their political affiliation.

3. This Court declare that the use of the six-month contract for the position of highway maintainer was a deliberate attempt to circumvent the Supreme Court ruling in *Rutan v. Republican Party*, ___ U.S. ___, 110 S.Ct. 2729 (1990).

4. This Court order Defendants, PEERMAN and BROWN, to instate Plaintiff in the position of highway maintainer at the IDOT Harrisburg shed.

5. This Court enter judgment in his favor and in favor of each member of the classes he represents and against the Defendants, GENELLE JONES, WILLIAM PEERMAN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE in the amount of $250,000.00 actual damages each and $1,000,000.00 punitive damages each.

6. This Court award Plaintiff legal fees and costs incurred in this litigation.

Plaintiff further prays for trial by jury as to the claims for damages.

Count II

(Pendant Jurisdiction)

1-17. Plaintiff realleges paragraphs 1 through 17 as paragraphs 1 through 17 of this Count.

2. Chapter 127 of the *Illinois Revised Statutes* sets forth the personnel system of the State of Illinois for employees under the jurisdiction of the Governor of the State of Illinois.

3. Under the rules and regulations adopted pursuant to Chapter 127 there has been established the permanent, civil service position of highway maintainer; those employed in that position have the full benefits of State of Illinois employment including health insurance and retirement; those benefits are not available to those working under contract.

4. There is no provision in Chapter 127 that allows that the duties of a permanent civil service position to be repeatedly performed under a six-month contract.

5. This awarding of six-month contracts to do the work of the highway maintainer position has been done to avoid the provisions of Chapter 127 and subverts the provisions of Chapter 127.

WHEREFORE, Plaintiff prays this Court declare the awarding the six-month contracts violates and subverts the provisions of Chapter 127 of the *Illinois Revised Statutes* and order that the awarding of such contracts cease.

/s/

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In The

Supreme Court of the United States

October Term, 1996

GARY VICKERY,

Petitioner,

v.

JANELL JONES, WILLIAM PEARMAN, KIRK BROWN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents William Roberts and the Saline County Republican Central Committee (hereinafter "Party Respondents") request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit. The Court of Appeals opinion is reported at 100 F.3d 1334 (7th Cir. 1996). For the convenience of the Court, all citations to the opinion of the United States Court of Appeals for the Seventh Circuit will be to the opinion attached as Appendix A to the Petition, all citations to the Memorandum and Order of the District Court will be to the opinion attached as Appendix C to the Petition, and all citations to the Complaint will be to the Second Amended Complaint attached as Appendix D to the Petition. Respondents Janell Jones, William Pearman and Kirk Brown, each employed by the State of Illinois Department of Transportation, are represented by other counsel and are collectively referred to as the "State Officials".

STATEMENT OF THE CASE

Correction of Case Statements in the Petition

The opinion of the Court of Appeals accurately sets forth the facts of this case. The opinion states the Party Respondents " . . . did not hire, promote, transfer or recall anyone . . . " (Op. at A-19). However, to comply with United States Supreme Court Rule 15.2, the Party Respondents bring the following misstatements of fact to the Court's attention.

Petitioner states in his brief, "The Republican County Chairman either selected a person or the name of a person was run by the Republican County Chairman for the Chairman's approval." Petition at 11. Petitioner then urges this Court to grant his Petition by stating: "This Court should grant the Petition in order to determine whether the First Amendment to the United States Constitution protects a political party's participation in a patronage system whereby the party, through its county chairman, selects persons for public employment." Petition at 14. Later, Petitioner revises the constitutional question before this Court as follows: " . . . whether or not the party's *virtual* selection of temporary public employees is protected by the First Amendment to the United States Constitution." Petition at 19 (emphasis supplied). In the instant case the Party Respondents did not select, virtually select, or otherwise hire Gene Bethel, the successful job applicant who was alleged to have been hired by the State Officials in place of Petitioner. Rather, the pleadings filed and evidence elicited at the trial court level indicate quite the opposite.

At the trial court level, the Petitioner pled that the Party Respondents had "approved" or "screened" or "supported" employment applications. (Complaint at par. 22, D-6, 7). The trial court found that the fact allegations were insufficient to state a claim, and did not allege Party Respondents actually hired applicants. The trial court also found that Party Respondents had simply recommended to the State Officials who should be hired. (Op. at C-7, 8).

On appeal to the Seventh Circuit, Petitioner submitted a summary of facts which was significantly watered-

down in comparison to those facts alleged in his Complaint. In his appellate brief, Petitioner failed to mention any specific action on the part of Party Respondents, stating only that State Officials had "admitted taking politics into consideration in filling temporary positions." (Brief of Plaintiff - Appellant Gary Vickery at 8-13). The Appellate Court thereafter found:

> . . . the Party Defendants did not hire, promote, transfer or recall anyone, their screening or recommending the hiring of employees for highway maintenance positions is not the same as being "jointly engaged with State Officials in the prohibited actions." (Op. A-19).
>
> . . . it is not controverted that the Party Defendants had no actual hiring authority and did not make the actual employment decisions. (Op. A-20).

Now Petitioner argues for the first time that the Party Respondents "selected" or arranged for the "virtual selection" of the successful job applicant. The change of terminology from approved, screened or supported to "selected" or "virtual selection" is a thinly veiled attempt to confuse the facts. The trial and appellate courts, upon review of the record, found that the Party Respondents did not hire the successful job applicant, and in fact had no hiring authority. Petitioner is now unable to support an allegation that these Party Respondents hired, selected or virtually selected the successful applicant. The record and discovery in the trial court is entirely unsupportive

of Petitioner's newfound allegations that Party Respondents selected or virtually selected Bethel.[1]

SUMMARY OF REASONS FOR DENYING PETITION

The decision below (*Vickery v. Jones*, 100 F.3d 1334 (7th Cir. 1996)) was in accordance with the body of law that protects political speech and expression pursuant to the First Amendment to the United States Constitution. There is no question of law at issue that justifies the grant of a writ of certiorari. The Seventh Circuit Court of Appeals did not enter a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Furthermore, the Court of Appeals did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. The Seventh Circuit Court of Appeals did not decide an important question of federal law that has not been, but should be, settled by this Court and the Seventh Circuit Court of Appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court.

[1] Petitioner made no citation to the record to support his allegation that Party Respondents select or virtually select persons for employment in Saline County. Petition at 11, 14, 19. Discovery depositions were conducted at the trial court level which support Party Respondents' view that Petitioner has misstated this fact. In that the transcripts of these depositions are not part of the record on appeal, Party Respondents make only brief and general reference to this sworn discovery testimony.

REASONS FOR DENYING THE PETITION

A. The Party Respondents Engaged in Protected Political Speech

Petitioner seeks to have this case reviewed so that this Court can determine the question of "whether the First Amendment to the United States Constitution protects a political party's participation in a patronage system whereby the party, through its County Chairman, selects persons for public employment". (Petition at 14). Petitioner presents the issue before this Court in a manner inconsistent with the underlying Complaint and the opinion of the Seventh Circuit. Petitioner wants this Court to believe that the issue proffered for consideration is whether the Constitution protects a political party's participation in a patronage system whereby the political party hires or "selects" the person for public employment.

In the underlying Complaint, the Petitioner never alleged that the Party Respondents "select" or "hire" persons for public employment. (Complaint at D-3 - D-7). In fact, in his Complaint, the Petitioner, at paragraphs 22(a) and 22(b), alleges that the State Officials made "decisions regarding employment". (Complaint at D-6). Contrary to alleging that the Party Respondents "selected" or hired persons for public employment, the Petitioner alleges that the State Officials "took advice from" the Party Respondents and that the Party Respondents "screened employees." (Complaint at D-6). The more accurate presentation of the issue before this Court is as follows: "whether the First Amendment to the United States Constitution protects a political party's

participation in a patronage system whereby the party, through its County Chairmen, gives advice to the State Officials who make decisions regarding employment."

The legal principles which govern the decision here are well-established. The First Amendment to the United States Constitution protects political speech and expression. The Party Respondents are entitled to advocate the hiring of a specific person to perform a governmental function. Such recommendations are political expressions for purposes of constitutional protection. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309, 2316 (1996); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223-224 (1989); *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

"The independent expression of a political party's views is "core" First Amendment activity . . . " *Colorado Republican Federal Campaign Committee*, 116 S.Ct. 2309, *citing Eu*, 489 U.S. at 222-23.

B. *Adickes* Does Not Govern the Present Case

Petitioner also wants this Court to grant his Petition for Writ of Certiorari so that the Court can consider whether *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970) and its progeny govern this case. As found by the District Court (*Vickery v. Jones*, 856 F.Supp. 1313 (S.D. Ill. 1994)) and the Seventh Circuit Court of Appeals, *Adickes* does not govern the present case. In *Adickes*, the plaintiff was a white school teacher who was refused service in a lunchroom when she was accompanied by six African-

American students, and was then arrested for vagrancy when she left the lunchroom premises. 398 U.S. at 146-47. The plaintiff filed a complaint under 42 U.S.C. § 1983 against both the owner of the lunchroom and the policeman who arrested her, claiming that a conspiracy existed between the two parties. *Adickes*, 398 U.S. 144 (1970). This Court held that:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a [lunchroom] employee, in the course of employment, and a Hattiesburg policeman *somehow reached an understanding* to deny Miss Adickes service in the [lunchroom], or to cause her subsequent arrest because she was a white person in the company of Negroes. . . . 'Private persons, *jointly engaged with state officials in the prohibited action*, are acting 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant in joint activity* with the State or its agents.'

Id. at 152 (citing *United States v. Price*, 383 U.S. 787, 794 (1966)) (emphasis added); *See*, also, *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 941-942 (1982).

To allege a cause of action under this Court's holding in *Adickes, Dennis* and *Lugar*, Petitioner's Complaint must have alleged that the Party Respondents and the State Officials somehow reached an understanding or conspired not to hire the Petitioner in violation of *Rutan v.*

Republican Party, 497 U.S. 62 (1990). Petitioner fails in his Complaint to adequately allege that there was a meeting of the minds between the State Officials and the Party Respondents or that the Party Respondents had been "willful participant[s] in joint activity with the State or its agents." In the present case, the Party Respondents cannot be parties to an understanding to violate *Rutan* because Petitioner does not allege that they have any hiring authority. The action prohibited by *Rutan* is the hiring, promoting, transferring or recalling of an individual based on his or her political association. *Rutan*, 497 U.S. at 65. The Petitioner fails to allege that the Party Respondents hired, promoted, transferred or recalled anyone. The screening or recommending for hiring of highway workers is not the same as being "jointly engaged with State Officials in the prohibited action." *Adickes*, 398 U.S. at 152.

Petitioner desires this Court to grant certiorari so that it can determine that the Party Respondents were jointly involved with the State Officials in depriving the Petitioner of his First Amendment rights by denying him a job for political reasons. The Petitioner's Complaint does not support this Court granting the Petition for Writ of Certiorari. United States Supreme Court Rule 10 does not support the granting of certiorari for the mere application of legal principles to specific facts. The District and Appellate Courts adequately applied the legal principles set forth in *Adickes* to the allegations in Petitioner's Complaint and found that the Petitioner failed to state a cause of action.

C. There is No Good Basis for the Extension of *Connick* to the Present Case

Petitioner also appears to ask this Court to grant certiorari so that it can explore the extension of the holding in *Connick v. Myers*, 461 U.S. 138 (1983), to individuals other than public employees. In *Connick*, this Court held that in cases alleging the violation of a public employee's free speech rights, the Court must first address the issue of whether the speech in question is of public concern. *Connick*, 461 U.S. at 146. The "public concern test" is intended to balance between the competing interest of public employees' free speech rights, on one hand, and the State's interest, as an employer, in promoting the efficiency of the public services it performs through its employees on the other hand. *Connick*, 461 U.S. at 142. There is no good basis for this Court to consider an extension of the rule set forth in *Connick* to the present case. There is no conflict at issue between circuit courts regarding application of *Connick*, there is no conflict at issue among decisions of state courts of last resort and there is no state or federal Court decision at issue that departed from this Court's decision in *Connick*. Furthermore, the Seventh Circuit Court of Appeals in refusing to extend *Connick* to the present case did not decide an important question of federal law which has not been, but should be, settled by this Court. The Party Respondents are not public employees whose free speech rights need to be balanced against the interests of employers.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under United State Supreme Court Rule 10 that there are important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been but should be settled by this Court nor has the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that the Party Respondents are entitled to advocate the hiring of a specific person to perform a governmental function and correctly refused to extend the holding in *Connick* to the facts of this case.

Respectfully submitted,

William Roberts and Saline County Republican Central Committee, Respondents

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

GARY VICKERY,
Petitioner,
v.

JANELL JONES, WILLIAM PEARMAN, KIRK BROWN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari ("Petition") identifies the following questions as those presented for review:

"1. Is a political party's participation in a patronage system, whereby the State Respondents delegate to the Party Respondents the selection of persons for public employment positions, protected by the First Amendment to the United States Constitution?

2. Did the Complaint state a cause of action against the Party Respondents?

3. Given the facts in this case, were the State Respondents entitled to qualified immunity when temporary employment positions were filled on a political basis?

4. By the spring of 1992, was the law clearly established that non-civil service public employment positions could not be filled based on political affiliation or political sponsorship unless the position fell under the exemptions defined by the United States Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980) and *Rutan v. Republican Party*, 497 U.S. 62, 110 S. Ct. 2629 (1990)?

5. By the spring of 1992, was the law clearly established that the nature of the position, not the duration of the public employment position, governed whether or not the public employment position could be filled politically?"

PARTIES TO THE PROCEEDINGS

The parties are properly identified in substance in the Petition, except that "Janell Jones" is now known as "Janell Hilgers"; William Pearman's title was "Bureau Chief of Personnel Management"; and Kirk Brown was the "Secretary of the Illinois Department of Transportation," not a "Director."

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INTRODUCTION

Petitioner Gary Vickery ("Petitioner") represents a class of plaintiffs who contend that their First Amendment rights were violated when they were not appointed as temporary highway maintainers by the Illinois Department of Transportation ("IDOT") because of their political affiliations. Petitioner argues that the actions of the respondent State officials Janell Hilgers, Kirk Brown and William Pearman ("the State Officials") violated this Court's decision in *Rutan v. Republican Party*, 497 U.S. 62 (1990). It is undisputed that the State Officials did consider, among other things, the political affiliation of some candidates for the position of temporary highway maintainer before July 6, 1994. However, before the district court made its legal ruling below on July 6, 1994, no court had ever considered whether *Rutan* extended to temporary employees -- individuals who, at least under Illinois law, may be hired for just one day or up to six months and who do not receive the benefits (other than a salary) of State employment. Consequently, the district court held that the State Officials were entitled to qualified immunity from damages on Petitioner's claims because before July 6, 1994, it was not clearly established that the protections in the *Rutan* decision extended to temporary workers. The Seventh Circuit affirmed the district court's ruling on qualified immunity. The district court and Seventh Circuit's ruling granting qualified immunity in the *Vickery* case is in complete agreement with the ruling of the district court and Seventh Circuit judges who considered the same issue in another Seventh Circuit case, *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996).

Petitioner now asks this Court to issue a writ of certiorari to review the Seventh Circuit's grant of qualified immunity. The Petition fails to demonstrate any proper

ground for granting review. The bulk of Petitioner's argument is an unfounded attack on the Seventh Circuit's proper application of the well-settled, uncontroversial qualified immunity standard to the undisputed facts of this case. That attack, even if (contrary to the opinion of eight federal judges) it had merit, does not warrant the issuance of a writ. Accordingly, the State Officials respectfully request that the Court deny the Petition.[1]

STATEMENT OF THE CASE

A. The State Officials' Temporary Highway Maintainer Hiring Practices.

IDOT is responsible for the design, construction and maintenance of approximately 42,000 lane-miles of roadways across the State of Illinois. (Pet. at A-3; R. 88, Ex. B ¶ 3.[2])

---

[1] The Petition also seeks review of the Seventh Circuit's holding as to the Saline County Republican Central Committee and William Roberts ("the Party Respondents"). In his Second Amended Complaint, Petitioner alleged that the Party Respondents were liable for the alleged violation of Petitioner's First Amendment rights because the Party Respondents acted in concert with the State Officials. The district court dismissed the claim against the Party Respondents because *Rutan* did not prohibit the dissemination of information by party members about a job candidate's political affiliation or the making of recommendations in favor of job candidates by party members. The district court also held that these activities were not actionable because they constituted protected expression. (Pet. at A-16 to A-17.) The Seventh Circuit affirmed. (Pet. at A-16 to A-22.) The State Officials do not address these issues in this Opposition because the ruling regarding the Party Respondents does not relate to the conduct or the liability of the State Officials.

[2] Throughout this Opposition, we use the following abbreviations to cite to relevant materials: "Pet." refers to the Petition for Writ of Certiorari; "R." refers to the numbered documents in the record on appeal below;

(continued...)

To fulfill these responsibilities, IDOT relies on a rank-and-file workforce of "highway maintainers." (Pet. at A-3; R. 88, Ex. B ¶ 3; R. 88, Ex. A. ¶ 4.) In 1994, IDOT employed approximately 1,940 permanent, full-time highway maintainers across the State. (8/31/94 Tr. at 63.) In order to meet the varying seasonal demands of its statutory mission (primarily the increased demands during the winter created by IDOT's snow removal duties) and to save the taxpayers money, IDOT also relies on the appointment of highway maintainers to temporary, seasonal positions. (Pet. at A-14; R. 94 at 10; 8/31/94 Tr. at 63; *id.* at 149-52; R. 88, Ex. A ¶ 4; *id.* Ex. B ¶ 4.) For the 1993 winter season, IDOT hired approximately 400 temporary highway maintainers, and IDOT had 800 additional persons on call if they were needed during severe weather. (Pet. at A-3; R. 94 at 11; R. 88, Ex. A ¶ 7; R. 88, Ex. B ¶ 5.)

Under the Illinois Personnel Code, temporary state employees share few of the benefits enjoyed by full-time state employees. Appointment to a particular temporary position (including temporary highway maintainer) may last as short as one day but in no event longer than six months in any twelve month period. 20 ILCS 415/8b.9. Temporary highway maintainers may not be transferred or promoted, Ill. Admin. Code tit. 80, Ch. I §§ 302.335, 302.450; offers of temporary employment do not constitute recall or reinstatement, Ill. Admin. Code tit. 80, Ch. I § 303.590(b);

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[2] (...continued)
"J. App." refers to the page number of the Joint Appendix filed in the Seventh Circuit by Petitioner separate from his main brief; "P. Br." refers to Petitioner's opening brief before the Seventh Circuit; and "8/31/94 Tr." refers to the transcript of the hearing on Petitioner's petition for a preliminary injunction, which was included in the record on appeal below.

and unlike permanent employees, temporary highway maintainers cannot invoke the strict statutory protections which limit the manner and circumstances in which full-time civil service employees may be discharged. In addition, temporary highway maintainers are not entitled to a wide range of other benefits afforded full-time employees, including (1) health insurance coverage, (2) pension plan participation, (3) sick leave, (4) personal leave, (5) leave of absence, (6) family responsibility leave, (7) paid leave for jury duty, (8) leave for military physical examinations, (9) leaves of absence for military service, (10) disaster service leave with pay, (11) voluntary reduction, or (12) vacation time. Ill. Admin. Code tit. 80, Ch. I §§ 302.220, 302.505, 303.90, 303.125, 303.140, 303.148, 303.171, 303.175, 303.180, 303.250. Temporary employees cannot accumulate continuous service. Ill. Admin. Code tit. 80, Ch. I § 302.250. Temporary employees also are exempt from the Service Men's Employment Tenure Act; as a result, they are not entitled to restoration to their temporary job after completion of military service. 330 ILCS 60/7.

Before July 6, 1994, the State Officials considered a variety of factors in appointing temporary highway maintainers, including political support or recommendations. (Pet. at A-4; J. App. at 8-11.) The State Officials did not view this Court's decision in *Rutan* as covering temporary workers for two reasons. *First*, the majority opinion in *Rutan* was premised in large part on the burdens which the patronage employment system alleged in that case placed on career employees; for example, career employees generally receive regular paychecks and increases in pay, which were compromised or denied to applicants or employees who allegedly could not obtain full-time positions without political

support. *See* 497 U.S. at 73, 77. The State Officials believed that this reasoning did not apply to temporary employees, whose term of employment is restricted in any event by Illinois statute and who receive no benefits besides a paycheck. *Second*, there was a well-established line of cases in the Seventh Circuit which held that independent contractors were not covered by the *Rutan* principles. (The reasoning of these cases was not repudiated until 1996 when this Court decided *O'Hare Truck Service v. City of Northlake*, 116 S. Ct. 2353 (1996).) The State Officials believed that because temporary employees enjoyed few of the benefits of full-time employees, temporary employees were more like *Rutan*-exempt independent contractors than like permanent employees. (R. 28.) As a consequence, before the district court's decision on July 6, 1994, the Sate Officials believed they were constitutionally permitted to favor temporary highway maintainer position candidates who were supported by the Republican Party, and they generally did so. (Pet. at A-4; J. App. at 11-12.)

B. The Decision In The District Court.

The State Officials moved to dismiss Petitioner's claims on the ground that the allegation that the State Officials considered political affiliation when appointing temporary highway maintainers did not state a claim for relief under 42 U.S.C. § 1983 and the First Amendment. The State Officials maintained that the *Rutan* decision did not extend to positions -- like the temporary highway maintainer positions here -- which do not provide the holder with the benefits of career employment. (R. 28.) The State Officials also demonstrated that even if the district court found that *Rutan* extended to temporary employees, the damage claims asserted against the State Officials should be dismissed under

the doctrine of qualified immunity because it was not "clearly established" that *Rutan* extended to temporary employees.

On July 6, 1994, the district court denied in part the State Officials' motion to dismiss and held that *Rutan* extends to temporary workers. (Pet. at C-13 to C-22.) Recognizing that no court had previously ruled on the question, however, the court dismissed the damages claim against the State Officials on qualified immunity grounds. (Pet. at C-22 to C-26.) On the issue of qualified immunity, the district court rejected Petitioner's assertion -- his *only* argument against qualified immunity before the district court -- that *Rutan* itself decided the question. The court noted that Ricky Standefer, one of the plaintiffs in *Rutan*, had once been a temporary employee. (Pet. at C-25.) But, the court explained (*id.*):

> "the mere fact that this [temporary] status was mentioned is not dispositive of the issue. What is critical is whether the parties *argued* that his status as a temporary employee would affect his claim or whether the Supreme Court expressed any opinion as to whether such status might be relevant. There is no indication that Standefer's status as a temporary employee was raised as an issue. Nor is there anything in *Rutan* to suggest that the Supreme Court took this status into consideration . . . Accordingly, the Court finds that at the time of the alleged violation, it was not 'clearly established' that *Rutan* applied to temporary employees."

In response to the district court's ruling that *Rutan* extended to temporary employees, the State Officials took immediate measures to halt the consideration of political

affiliation in the appointment of all temporary state employees. (Pet. at A-5; J. App. at 17-19, 21-29.) The State Officials answered the Second Amended Complaint, and after preliminary injunction proceedings not relevant to the Petition, moved for judgment on the pleadings on Petitioner's remaining claims for injunctive and declaratory relief. On December 6, 1995, after an interlocutory ruling regarding Petitioner's claims and the settlement of his individual claim for instatement, the district court entered a final judgment which granted a declaratory judgment in favor of Petitioner (and the classes he represented) that the State Officials' "use of political affiliation as a criterion for hiring temporary highway maintainers is unconstitutional [under] *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)"; the final judgment denied Petitioner any other relief. (Pet. at B-1 to B-3.)

C. The Decision In The Court Of Appeals.

Petitioner appealed the district court's ruling granting qualified immunity to the State Officials, and the State Officials cross-appealed the district court's entry of a declaratory judgment. The Seventh Circuit affirmed the district court opinion in all respects.[3] On the issue of

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[3] In their brief before the Seventh Circuit, the State Officials also argued that the district court's ruling on the merits -- that *Rutan* extended to temporary employees -- was erroneous. The State Officials' position was premised in large part on the long line of Seventh Circuit cases, culminating in *O'Hare Truck Service v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995), which held that *Rutan* did not apply to independent contractors. After the Supreme Court issued its decision reversing the Seventh Circuit's decision in *O'Hare Truck Service v. City of Northlake* (116 S. Ct. 2353 (1996)) during the pendency of the appeal in the Seventh Circuit, the State Officials acknowledged that the temporary highway maintainer position was covered by *Rutan*.

qualified immunity, the Seventh Circuit first noted that a different panel of the court had recently decided *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996), a case which raised issues very similar to those raised in this case. In *Tarpley*, the Seventh Circuit affirmed the district court, which found that Illinois State officials who had considered political affiliation when making a temporary appointment were entitled to qualified immunity because the application of *Rutan* to temporary employees was not clearly established in 1992. (Pet. at A-5 to A-6.)

Addressing Petitioner's arguments in this case, the Seventh Circuit first rejected the Petitioner's contention that prior cases in this Court had clearly established that *Rutan* applied to temporary employees. (Pet. at A-8 to A-11.) The Seventh Circuit noted that the cases cited by Petitioner all involved "the discharge of a full-time non-civil service employee based on political association," and that Petitioner's attempt to analogize this Court's prior cases to this case "is not persuasive." (*Id.* at A-8.) While the court recognized that one plaintiff in the *Rutan* case had once been a temporary garage worker, it noted that "it was far from clear that the Supreme Court made its decision on that basis." (*Id.* at A-9.) The Seventh Circuit concluded (*id.* at A-10 to A-11):

> "[Petitioner] has not provided a 'closely analogous' case that covers both the *Rutan* holding and its application to temporary employment positions like the temporary highway maintainer positions, nor has he shown that using information regarding an applicant's political affiliation was so obviously unconstitutional that the [State

> Officials] should have known that they were violating the law."

The Seventh Circuit also rejected Petitioner's argument that certain actions and pronouncements of Illinois State officials following the *Rutan* decision deprived the State Officials in this case of qualified immunity. (*Id.* at A-11 to A-12.) Petitioner argued that Illinois State officials had "deceived" the public by not including temporary employees on the publicly-posted lists of employees which the State had determined were exempt from the *Rutan* decision under the *Branti* exception, but nonetheless treating temporary employees as exempt. (*Id.* at A-11.) The court held that Petitioner had not "provided sufficient evidence that any deliberate deception was practiced" by the State Officials. (*Id.* at A-12.) The court also held that, even if there were such evidence, Petitioner had failed to offer any legal theory on which the actions and pronouncements of other State officials could deprive the State Officials in this case of qualified immunity: "the [Petitioner] has not cited any authority that would support a finding that the State's public pronouncements affect the [State Officials'] entitlement to

qualified immunity from federal constitutional claims."[4] (*Id.*)

REASONS FOR DENYING THE WRIT

The Court should deny the Petition because it is nothing more than an attempt to have the Court review the Seventh Circuit's application of settled law to the facts in this case. Although the Petition purports to identify three questions pertaining to the State Officials (numbers 3-5), it actually presents just one issue: whether the State Officials were entitled to qualified immunity from damages for considering political affiliation when hiring temporary highway maintainers prior to July 6, 1994. There is nothing in the Seventh Circuit's resolution of that issue which warrants this Court's exercise of its certiorari review authority under the criteria specified in Supreme Court Rule 10.

First, as we show in Part A, the Seventh Circuit's opinion below does not present an "important question of federal law" that warrants certiorari review. *Second*, as we demonstrate in Part B, the Seventh Circuit's opinion below does not conflict with the decision of any other United States

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[4] The Seventh Circuit made three additional rulings not relevant to the Petition as it relates to the State Officials. First, the court rejected another qualified immunity theory Petitioner pressed below -- that the State Officials had engaged in a deliberate "scheme" to "circumvent" *Rutan*; Petitioner does not seek review of this ruling. Second, the court affirmed the entry of a declaratory judgment in favor of Petitioner over the State Officials' Eleventh Amendment objection; the State Officials do not seek review of that ruling. Third, the court affirmed the district court's dismissal of the claim against the Party Respondents; the State Officials do not address the issues relating to the Party Respondents. (Pet. at A-16 to A-22.)

court of appeals. *Third*, as we demonstrate in Part C, there is nothing exceptional or compelling about this case which warrants review even in the absence of any other consideration favoring certiorari review.

A.

Petitioner Does Not Identify Any Important Question Of Federal Law Decided By The Seventh Circuit That Warrants Certiorari Review.

The "reasons" Petitioner offers for granting the writ are little more than a reargument of the merits of his position on qualified immunity, which was rejected by the district court and Seventh Circuit below, as well as by the district court and the Seventh Circuit in the *Tarpley* case. As we demonstrate in Part C below, Petitioner's arguments do *not* have merit, which is a separate and independent reason for denying the Petition. However, even assuming, contrary to fact and for the sake of argument only, that Petitioner's arguments on the underlying merits were persuasive, his arguments do not show he is entitled to a writ. As we demonstrate below, Petitioner (1) does not identify an "important" federal question, and (2) even if he did, the analysis by the Court of Appeals is entirely consistent with the decisions of this Court.

1. The opinion below does not implicate any "important" federal question.

The legal standard governing qualified immunity has been well-defined by this Court. The Seventh Circuit's opinion below applies the established law to the facts of this case, and does not raise any additional, novel or "important" federal legal questions. Moreover, because the qualified immunity inquiry is highly fact-specific, the importance of

any individual qualified immunity decision applying the proper law to the facts -- like the decision below -- is limited to other cases with very similar facts. Consequently, the Petition does not warrant certiorari review to address any important federal question.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court announced the now-accepted test for qualified immunity. Rejecting the common law "subjective" element of the test, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* Whether a government official is entitled to qualified immunity turns on the "objective legal reasonableness" of the official's action, which is assessed in light of the "legal rules that were 'clearly established' at the time the action was taken." *Id.* at 819, 818.

In *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), the Court further explained that rights allegedly violated by the government official must be evaluated in a "particularized" sense. Thus, the lawfulness of the government official's action turns on a "fact-specific" inquiry taking into account all of the circumstances confronting the government official. *Id.* at 641. These principles have been repeated so often by this Court and the Seventh Circuit that they are, themselves, "clearly established" and cannot be controversial in any sense. (Indeed, the Seventh Circuit has stated these principles so often that it often omits an extended discussion of the principles as repetitious. *See, e.g. Anderson v. Holmes*, 16 F.3d 219, 221 (7th Cir. 1994).)

The effect of this Court's *Anderson* decision has been to limit the precedential value of individual qualified immunity cases to future cases with almost identical facts. In response to this Court's command in *Anderson*, the Seventh Circuit (and other lower courts) have explained the key role that the particular facts of a case play in the qualified immunity determination. "Once the defendant's actions are defined or characterized according to the specific facts of the case this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." *Glass v. Dachel*, 2 F.3d 733, 745 (7th Cir. 1993). Consequently, the specific facts in each case are critical in addressing the defense of qualified immunity. *Id.* Thus, where (as here) the general right is well-established, the crucial question remains whether "the law was clear in relation to the specific facts confronting" the official at the time of the conduct. *Scott v. Glumac*, 3 F.3d 163, 164 (7th Cir. 1993).

The Petition fails to identify an important federal question justifying review because the Seventh Circuit correctly applied these established qualified immunity principles, and the Seventh Circuit's application of these principles to the facts of this case has no general, substantive application beyond the borders of this particular case. Petitioner fails to identify any defect with the Seventh Circuit's articulation of the legal standard for determining qualified immunity. Indeed, the opinion below properly explains that qualified immunity shields government officials unless they violate "clearly established" rights "of which a reasonable person would have known"; that the inquiry

"turns on the 'objective legal reasonableness' of the action"; and that to avoid qualified immunity the plaintiff must show that the right was clearly established by either providing a "'closely analogous' case covering both the right at issue and its application to the facts of the case at hand or showing that a reasonable person would have known that they were violating the law because such violation was so obvious." (Pet. at A-7 to A-8.) The Seventh Circuit therefore did not err when it recited the legal standard for evaluating qualified immunity claims.

What is left is the court's application of that standard to the facts of this case which, in general, is not a sound reason to grant the writ. Supreme Court Rule 10. In this case, as demonstrated below in Part C, the Seventh Circuit's application was absolutely proper, and the result correct. However, even assuming some error in that application, that error would not constitute an important legal question of any general relevance or application because the qualified immunity standard is so fact specific. The reach of the Seventh Circuit's ruling is strictly limited to *Rutan* claims involving temporary employees, and to conduct occurring before July 6, 1994.[5] This ruling, even if (contrary to fact)

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[5] Indeed, the statute of limitations has already run on any action arising in Illinois based on any conduct which would be affected by the opinion below. The opinions below only determined that before July 6, 1994, it was not clearly established that *Rutan* extended to temporary workers. The statute of limitations for claims under Section 1983 for *Rutan* violations arising in Illinois is two years (*see Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 952 (1997)), so the statute ran on any claim affected by the decision below two years from the date the district court issued its opinion, or on July 6, 1996. Consequently, the application of the qualified immunity standard in this

(continued...)

it were erroneous, does not amount to an important question of federal law which justifies the Court's exercise of its scarce certiorari jurisdiction.

2. The opinion below is consistent with this Court's decisions.

Even if Petitioner could identify an important question of federal law raised by the decision below, review by the Court still is not warranted because the Seventh Circuit's opinion is completely consistent with this Court's decisions. Petitioner nowhere explicitly contends that a writ should issue because the opinion below conflicts with a particular ruling of this Court. However, in his attempt to demonstrate that the Seventh Circuit wrongly applied the law to the facts here, Petitioner twice implies that the Seventh Circuit's opinion is contrary to this Court's decisions. Petitioner is wrong in both instances.

First, Petitioner apparently contends that the Seventh Circuit's use of a wholly "objective" standard for qualified immunity conflicts with this Court's opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). (Pet. at 19-20.) In support of his contention, Petitioner misleadingly cites only the concurring opinion of Justice Brennan in *Harlow*, and with good reason: Justice Brennan's concurrence does not reflect the opinion of the Court or its later decisions concerning the objective nature of the qualified immunity inquiry. In

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[5] (...continued)
case would have precedential value only for a very limited group of possible cases: other *Rutan* actions concerning temporary employees filed by July 6, 1996, that concerned conduct which occurred before July 6, 1994. The State Officials are not aware of the pendency of any such cases.

Harlow, the opinion of the Court abolished the "subjective aspect" of the qualified immunity analysis because the costs of adjudicating subjective intent were too high. 457 U.S. at 815-19. Since *Harlow*, it has been well-settled that the qualified immunity test is, in the first instance, a purely objective one. *See, e.g., Behrens v. Pelletier*, 116 S. Ct. 834, 838 (1996) (test is "objective" and not based on defendant's "good faith"); *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (test is now "wholly objective"); *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (*Harlow* "completely reformulated qualified immunity" inquiry to replace "subjective" inquiry with "objective" test); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (*Harlow* "purged qualified immunity doctrine of its subjective components"). The opinion below does not conflict in any way with this Court's qualified immunity jurisprudence in *Harlow* or any other case.

Second, Petitioner apparently contends that the Seventh Circuit's opinion conflicts with this Court's prior decisions because they "clearly established" that *Rutan* extends to temporary employees. (Pet. at 22-26.) But this Court has never been presented with the question whether *Rutan* extends to temporary employees, and none of the cases cited by Petitioner even broached that subject. The Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972) did not involve the political association rights of temporary employees; it involved the free speech rights of a college professor who was employed pursuant to four successive one-year contracts. The plaintiffs in *Elrod v. Burns*, 427 U.S. 347 (1976), were permanent, full-time office staff, including a bailiff, a process server, and a division supervisor in the Cook County Sheriff's Office, who sued the new

Sheriff for discharging them solely because they refused to support and were not sponsored by the Democratic Party. 427 U.S. at 350-51. The plaintiffs in *Branti v. Finkel*, 445 U.S. 507 (1980), were two assistant public defenders who had served for several years before they were dismissed by the new Public Defender for political reasons. 445 U.S. at 509. And, although one plaintiff in *Rutan* had been a temporary garage worker (497 U.S. at 67), as the district court and Seventh Circuit held, "it was far from clear that the Supreme Court made its decision on that basis." (Pet. at A-9.) In sum, as the Seventh Circuit held: "Prior to the district court's July 6, 1994 opinion, no court had explicitly decided the question whether the protection afforded in *Rutan* extended to temporary workers." (*Id.*) The Seventh Circuit's holding that *Rutan*'s extension to temporary employees had not been "clearly established" by this Court does not conflict with any decision of this Court.

B.

Petitioner Does Not Identify Any Circuit Split Over The State Officials' Entitlement To Qualified Immunity.

Petitioner does not identify any conflict between the Seventh Circuit's holding that the State Officials were entitled to qualified immunity on the facts of this case and a holding of another United States court of appeals. Indeed, petitioner cannot do so, because no other court of appeals has *ever* addressed whether state officials who considered political affiliation when filling temporary positions were entitled to qualified immunity. Put simply, there is no other opinion with which the Seventh Circuit's holding could conflict.

Nonetheless, petitioner generically contends that the courts of appeal "are sharply divided on the issue of qualified immunity in patronage cases." (Pet. at 26.) In support of this contention, Petitioner cites to but one opinion -- the Sixth Circuit's decision in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996). Petitioner asserts that under *McCloud*, state officials' entitlement to qualified immunity for an alleged violation of *Rutan* depends "on the *nature of the position*," and that had he been able to bring his action in the Sixth Circuit, the State Officials "would not have been entitled to qualified immunity." (Pet. at 26, 29.) Petitioner is wrong.

Petitioner's citation to *McCloud* is a misleading attempt to manufacture a conflict between circuits where none exists. The issue in this case -- whether it was clearly established before July 6, 1994 that *Rutan* extended to temporary employees -- was never even raised in the *McCloud* case because no plaintiff in that case was a temporary employee. In *McCloud*, nine permanent, full-time employees of the Auditor of Franklin County, Ohio sued Joseph Testa after Testa was appointed auditor and fired the plaintiffs. The plaintiffs contended that their firings were improper patronage dismissals, and sued Testa for an alleged violation of the First Amendment. Testa moved for summary judgment, contending that he was entitled to qualified immunity because it was not clearly established that the plaintiffs' positions fell outside the exception in *Branti*, but the district court denied his motion. On interlocutory appeal, the Sixth Circuit noted that in *Branti* this Court created a distinction between workers based on their duties. Ultimately, the Sixth Circuit held that Testa was entitled to qualified immunity as to one of the nine plaintiffs, but that the issue of qualified immunity could not be resolved with

respect to the others on summary judgment because of factual disputes concerning the duties of the plaintiffs' positions. 97 F.3d at 1553-62.

The *McCloud* case has nothing whatsoever to do with the issue the Seventh Circuit and the district court decided below. The issue here is very narrow: whether the State Officials were entitled to qualified immunity from damages for their consideration of political affiliation when hiring *temporary* highway maintainers prior to July 6, 1994. None of the plaintiffs in *McCloud* was a temporary employee. Furthermore, *McCloud* analyzed the *Branti* exception to *Elrod* and *Rutan*, which was not at issue in this case; neither the district court nor the Seventh Circuit below held that the "nature of the position" -- i.e., the duties of the position -- is irrelevant for purposes of determining whether qualified immunity is available under *Branti*.[6] And the Sixth Circuit never held in *McCloud* that no considerations *other* than the *Branti* exception, such as the temporary nature of a position, might entitle a state official to qualified immunity; the Sixth Circuit never even addressed that issue. The questions posed and answered here and in *McCloud* are wholly different, and neither opinion even addresses the question posed in the other case.

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[6] Indeed, the existence of the *Branti* exception applied in *McCloud* is well-settled in the Seventh Circuit, and the Seventh Circuit has applied the exception to determine the availability of qualified immunity in many cases. *See, e.g., Hernandez v. O'Malley*, 98 F.3d 293, 296-97 (7th Cir. 1996); *Mitchell v. Thompson*, 18 F.3d 425, 427 (7th Cir.), *cert. denied*, 115 S. Ct. 191 (1994); *Pounds v. Griepenstroh*, 970 F.2d 338, 340 (7th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993); *Upton v. Thompson*, 930 F.2d 1209, 1213 (7th Cir. 1991).

Moreover, analytically, these two decisions address completely different steps in First Amendment analysis. Below, the Seventh Circuit granted the State Officials qualified immunity because it was not clearly established that the promise or loss of a temporary position based on political affiliation was a significant burden on First Amendment freedoms because temporary employees in Illinois receive little more than a paycheck, for a limited period of time. (Pet. at A-8 to A-9.) That holding addresses the prima facie element of a plaintiff's First Amendment claim, that is, the need to show a significant burden on protected conduct. *Cf. Rutan*, 497 U.S. at 71. In distinction, the *McCloud* case addressed the applicability of the *Branti* standard, which goes not to what the plaintiff must show to prevail, but to whether the defendant government official can avoid liability by showing a compelling government interest in order to satisfy strict scrutiny. *Id.* There simply is no conflict between *McCloud* and the Seventh Circuit's opinion below.

Petitioner's citation (at 28-29) to certain language in *McCloud* concerning the difference between uncertainty in the facts and the law likewise fails to demonstrate any circuit split. In this case, the facts presented to the Seventh Circuit, and in particular the facts concerning the duties of temporary highway maintainers, were completely undisputed. (*See* Pet. at 29 (the State Officials "admitted the duties of the temporary position were *identical* to the duties of the permanent position") (emphasis in original); Pet. at A-3; J. App. at 6.) Thus, contrary to Petitioner's implication, the Seventh Circuit did not hold in this case that a qualified immunity determination can be made based on factual uncertainty as to the duties of a particular position.

In this case, the Seventh Circuit simply held that prior to Petitioner's lawsuit, the law was not clearly established that *Rutan* extended to temporary employees. In order to show a circuit split, Petitioner would need to identify a case from another circuit in which the court concluded that the application of *Rutan* to temporary employees *had* been clearly established prior to July 6, 1994. Petitioner has failed to cite any such case, and there is therefore no circuit split requiring resolution by this Court.

C.

This Is Not An Exceptional Case Warranting Certiorari Review Of The Seventh Circuit's Straightforward Application Of Settled Law To The Facts.

Petitioner has not shown -- and cannot show -- that review is warranted by the Court. There is no important issue of federal law that the Court should settle, no conflict with any decision of this Court, and no conflict among the circuit courts of appeal. What remains is the Seventh Circuit's unremarkable application of well-settled qualified immunity principles to the particular facts of this unique case. Under these circumstances, as the Court makes clear in Rule 10, a petition for certiorari review is "rarely granted," and Petitioner has not shown that there is any exceptional element present in this case that justifies review by this Court. In particular, review is not warranted here because the Seventh Circuit's reasoning and result were correct and just, and therefore the Court need not intervene to correct an injustice.

Eight different federal judges have determined that the State Officials were entitled to qualified immunity from damages for considering political affiliation when filling

temporary positions prior to July 6, 1994: Judge Foreman in the district court below (Pet. at C-22 to C-26); a unanimous panel of the Seventh Circuit below (Pet. at A-6 to A-16); Judge Gilbert, the district court judge in the *Tarpley* case; and a unanimous panel of three different judges of the Seventh Circuit in *Tarpley* (96 F.3d at 927). The question of qualified immunity turns, of course, on the clarity of the legal rule at the time of the conduct at issue. *Harlow*, 457 U.S. at 818. Given that eight judges who have examined the law as it stood in 1994 have determined that it was unclear, it is unreasonable -- and contrary to the purpose of qualified immunity -- to expect state officials to anticipate that a different court would come to a contrary conclusion. *Id.*; *Hernandez v. O'Malley*, 98 F.3d 293, 296-97 (7th Cir. 1996). Consequently, the decisions of the district court and the Seventh Circuit which granted the State Officials qualified immunity from damages were correct, fair, and just.

Despite the unanimous decision of an eight-member "jury" of judges, Petitioner's entire argument is that the Seventh Circuit's opinion was wrong for two reasons. Neither reason has merit.

1. This Court's decisions did not clearly establish the law concerning temporary workers.

Petitioner contends that the State Officials are not entitled to qualified immunity because this Court's decisions in *Perry*, *Elrod*, *Branti* and *Rutan* clearly established that *Rutan* extends to temporary employees. (Pet. at 22-26.) As we explained above in Part A.2, Petitioner is simply wrong: except for *Rutan*, none of the cases he cites even involved temporary employees, so in the fact-specific qualified immunity inquiry, they could not have clearly established the law as to temporary employees. And although one plaintiff

in *Rutan* had been a temporary employee, there was no issue about that plaintiff's temporary status in *Rutan*. As the Seventh Circuit and district court observed below (Pet. at A-9 (emphasis in original)):

> "[T]he fact that the worker's prior status as a temporary worker was mentioned in connection with the *Rutan* decision is not dispositive; '[w]hat is critical is whether the parties *argued* that his status as a temporary employee would affect his claim or whether the Supreme Court expressed any opinion as to whether such status might be relevant.'"

Petitioners have not demonstrated (and cannot demonstrate) any error in the unanimous decision of eight federal judges that the law concerning temporary employees was not clearly established before July 6, 1994.

2. Illinois state administrative orders cannot deprive the State Officials of qualified immunity.

Citing a number of administrative orders and lists generated by Illinois State officials, Petitioner contends that the State Officials are not entitled to qualified immunity from federal constitutional claims because they are "bound" by their own orders. (Pet. at 19-22.) Petitioner asserts that orders and lists issued by Illinois State officials were supposed to list all employees who were exempt from *Rutan*, and that the orders and lists issued did not mention any temporary employees. (Pet. at 20-21.) Petitioner contends that the orders he cites "correctly stated the law"; the State Officials were "bound" by these orders; the orders "correctly state what the [State Officials] knew"; and therefore to allow

the State Officials qualified immunity would make a "mockery of the doctrine." (Pet. at 22.) Petitioner's reliance on these state-generated documents in his attempt to demonstrate that the Seventh Circuit erred in granting the State Officials qualified immunity from *federal constitutional claims* is completely misplaced for three reasons.

First, Petitioner has waived the *legal* argument he now makes because he never presented it to the district court or the Seventh Circuit below. In this Court, Petitioner contends that the State Officials are not entitled to qualified immunity based on these orders because they demonstrate that the State Officials "actually knew" that their actions violated the law. (Pet. at 20; *see also id.* at 22.) Petitioner never made this argument to the district court or the Seventh Circuit. (P. Br. at 23-27.) To be sure, Petitioner cited the factual materials -- the administrative orders and the lists of *Branti*-exempt employees -- before the Seventh Circuit. (P. Br. at 23-26.) However, Petitioner's legal argument before the Seventh Circuit was that the State Officials should not be entitled to qualified immunity because they had run a "secret patronage system," and to give them qualified immunity would be "to reward deception." (P. Br. at 24, 27.) Petitioner *never* argued, as he does exclusively now, that the orders and lists showed that the State Officials actually knew that they were violating the law, or even that if they did, that would deprive them of qualified immunity. The Court should not even consider this "reason" for granting the writ, because it was waived.

Second, even if it were not waived, Petitioner's new argument lacks any factual basis because the orders and lists cited by Petitioner do not establish what the State Officials knew concerning the state of patronage jurisprudence as to

temporary workers. Petitioner asks the Court to infer, based on the fact that these state-generated documents relating to the *Branti* exception did not mention temporary workers, that the State Officials in this case knew that it was clearly established under federal constitutional law that *Rutan* extended to temporary workers. This is neither a fair nor logical inference. As we have shown above, the *Rutan* decision did not address or even involve the filling of temporary positions; consequently, the orders, manuals and other documents interpreting and implementing that decision generated by Illinois State officials had no reason to address the issue raised in this case. The omission of any discussion of temporary employees from the documents dealing with the *Branti* exception cited by Petitioner in no way undermines the purely legal judgment made by the State Officials, in mid-1991, that the *Rutan* decision does not apply to temporary appointments for reasons wholly unrelated to the *Branti* exception. (*See* 8/31/94 Tr. at 20.)

Third, Petitioner's argument lacks any legal basis because the State Officials' alleged intent to violate the law is irrelevant. As we demonstrated above, the state of the State Officials' subjective belief about the legality of their conduct is simply not an issue in the objective post-*Harlow* qualified immunity analysis. *Behrens*, 116 S. Ct. at 838; *Wyatt*, 504 U.S. at 166; *Anderson*, 483 U.S. at 645; *Mitchell*, 472 U.S. at 517. Even if, contrary to fact, Petitioner could show that the State Officials subjectively believed that their actions violated the law, the State Officials would still be entitled to qualified immunity unless the Petitioner was able to demonstrate that the State Officials' conduct in fact violated "clearly established" objective law.

To the extent that Petitioner continues to urge that qualified immunity is inapplicable because the State Officials are "bound" by the administrative orders and lists, Petitioner has not cited (and cannot cite) any authority whatsoever to support his argument. While Petitioner appears to suggest that some type of equitable estoppel should apply, in general, statements by government officials do not provide a basis for equitable estoppel against the government. *Crown v. U.S. Railroad Retirement Board*, 811 F.2d 1017, 1020 (7th Cir. 1987). Even assuming (for the sake of argument) that the State Officials could be estopped from arguing that *Rutan* does not extend to temporary employees, Petitioner has presented no evidence to satisfy the basic requirements of an estoppel claim, including but not limited to the essential element of a knowing misrepresentation or concealment of a material fact. *See Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 280 (7th Cir. 1994).

Moreover, even assuming (contrary to fact and law) that Petitioner had some type of estoppel claim, plaintiffs have not even attempted to show how a common law estoppel argument can affect the State Officials' *entitlement to qualified immunity from federal constitutional claims* on the facts here. For qualified immunity, the only question is whether, given the particular facts of this case, the State Officials' conduct violated clearly established federal law. *Harlow*, *supra*; *Anderson*, *supra*. Adding Petitioner's unfounded allegation that certain Illinois State officials failed to disclose that temporary employees were being treated as exempt from *Rutan* into the factual mix, the qualified immunity question becomes whether the State Officials violated clearly established law by appointing temporary highway maintainers on the basis of (among other factors)

political affiliation without informing the general public that political affiliation was considered. Petitioner has been no more successful at locating "clear" authority regarding a secret system than he was at finding "clear" authority concerning *Rutan*'s application to temporary employees. The Seventh Circuit properly rejected Petitioner's unfounded contention and granted the State Officials qualified immunity.

CONCLUSION

For the foregoing reasons, Respondents request that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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